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Clk. Sup. Ct. U. S.

SUPREME COURT OF THE UNITED STATES.

No. ~~80.~~ ~~18.~~ 13.

JOHN REYNOLDS & JOSIAH E. McLURE, Plffs. in Error,

v.

ROBERT FORSYTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF ILLINOIS.

G. S. Gideon, Printer, No. 511 Ninth Street, Washington, D. C.

Revd with costs

Dec: 15. 1862

SUPREME COURT OF THE UNITED STATES.

No. 80.

JOHN REYNOLDS & JOSIAH E. McLURE, Plffs. in Error,

v.

ROBERT FORSYTH.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

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United States of America, Northern District of Illinois.

Pleas in the Circuit Court of the United States for the Northern District of Illinois, held at the city of Chicago, in the district aforesaid, before the Hon. John McLean, one of the justices of the Supreme Court of the United States, presiding, and the Hon. Thomas Drummond, judge of the District Court of the United
2 States for the Northern District of Illinois, associate, on Wednesday, the twenty-third day of July, in the year of our Lord one thousand eight hundred and fifty-six, and of our Independence, the eighty-first year.

ROBERT FORSYTH
v. } In Ejectment.
JOHN REYNOLDS and JOSIAH E. MCCLURE.

Be it remembered, that heretofore, to wit, on the twenty-second day of December, in the year of our Lord eighteen hundred and fifty-four, in the December term, A.D. 1854, of the Circuit Court of the United States for the District of Illinois, came into court the said Robert Forsyth, by Williams & Lawrence, his attorneys, who 3
filed in open court his declaration, notice, affidavit of service, and bond for costs, in the above-entitled cause, in the words and figures following, to wit:

United States of America, State and District of Illinois.

Circuit Court of the United States, December Term, A.D. 1854.

Robert Forsyth, the plaintiff in this suit, who is a citizen of the State of Missouri, one of the United States of America, complains of John Reynolds and Josiah E. McClure, defendants in this suit, who are citizens of the State of Illinois, in the United States of America, of a plea whereof they, the said defendants, with force and 4
arms, &c., entered into the following described premises:

For that whereas heretofore, to wit, on the first day of November, in the year of our Lord one thousand eight hundred and fifty-four, the said plaintiff was possessed of certain premises situated at and within the county of Peoria and State of Illinois, and described as follows, to wit: A part of claim numbered seven, in the village of Peoria, in the State of Illinois, as confirmed to Thomas Forsyth, by an act of Congress approved March 3d, A.D. 1823, entitled "An

5 act to confirm certain claims to lots in the village of Peoria, in the
State of Illinois," commencing at a point on First street, eighty-two
feet from the most easterly corner of said claim, being the corner
upon First street and the cross street "B;" thence along First street
and the southwesterly line of said claim seventy-eight feet; thence
on a line parallel with the line dividing lots two and three, in block
No. fifty, in Bigelow and Underhill's addition to Peoria, and forty
feet therefrom, one hundred and ten feet, to Water street, as laid off
in said addition; thence along Water street, towards the cross
6 street "B," seventy-eight feet; thence on a line parallel with the
line dividing lots one and two, in said block fifty, in Bigelow & Underhill's addition, and twenty-two feet therefrom, one hundred and
one feet, to the place of beginning; it being a part of lots two and
three, in block fifty, in Bigelow & Underhill's addition, and being
seventy-eight feet on Water street, running the same width to First
street.

And the said plaintiff, being then and there so possessed of
said premises, they, the said defendants, afterwards, to wit, on the
7 second day of November, in the year aforesaid, entered into the
said described premises, and from the time last aforesaid have unlawfully withheld, and do now unlawfully withhold the possession of the
said premises from the said plaintiff. And the said plaintiff avers that he claims the title to the said premises in fee-simple, and that the said plaintiff is a citizen and inhabitant of the State of Misssouri, in the United States of America, and that the said defendants are citizens and inhabitants of the State of Illinois, in the United States of America; and the said plaintiff further avers that the value of the aforesaid premises, being the matter in dispute, exceeds, exclusive of costs, the sum of five hundred dollars, wherefore the said plaintiff says he is injured and has sustained damage to the amount of five hundred dollars, and therefore he brings suit, &c.

WILLIAMS & LAWRENCE,
Attorneys for Plaintiff.

You are hereby notified that the declaration, with a copy of which
you are now herewith served, and to which copy this notice is subjoined, will be filed in the Circuit Court of the United States for the
District and State of Illinois, on the first day of the December term,
9 A.D. 1854, or as soon thereafter as counsel can be heard, and that
upon filing the same, a rule will be entered requiring you to appear and plead to the said declaration, within twenty days after the entry of said rule, and if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated this 16th day of November, A.D. 1854.

WILLIAMS & LAWRENCE,
Attorneys for Plaintiff.

Personally served on John Reynolds and Josiah E. McClure, the defendants in this suit, who are the actual occupants of the premises for which this action is brought, with a true copy of the declaration hereto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and likewise annexed. 10

PEORIA, November the 18th, A.D. 1854.

HARRY WILTON,
U. S. Marshal District of Illinois.
By M. R. OWENS,
Deputy Marshal.

State of Illinois, County, *ss.*
Circuit Court of the United States, State and District of Illinois, Term, A.D. 185 .

ROBERT FORSYTH
v.
JOHN REYNOLDS and JOSIAH E. McCLURE.
} In Ejectment.

M. R. Owen, being duly sworn, deposes and says, that he did, on the 18th day of November, A. D. 1854, personally serve John Reynolds and Josiah E. McClure, the defendants in this suit, who are the actual occupants of the premises for which this action is brought, with a true copy of the declaration hereto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and likewise hereunto annexed; and further this deponent saith not. 11

M. R. OWEN.

Sworn and subscribed to before me this 21st day of February, A. D. 1856.

WM. H. BRADLEY,
Clerk.

United States of America, State and District of Illinois. Circuit Court of the United States, December Term, A. D. 1854.

ROBERT FORSYTH
v.
JOHN REYNOLDS, JOSIAH E. McCLURE.
} In Ejectment.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party, or to any of the officers of this court, in pursuance of the laws of this State. Dated this sixteenth day of November, A. D. 1854.

GEORGE W. FRIDLEY.

Indorsed: Filed Dec. 22d, 1854. Wm. Pope, clerk. 13

And on the next day, to wit, the 23d day of December, in the December term, A. D. 1854, of said court, in the record of the proceedings thereof in said cause is the following entry, to wit:

ROBERT FORSYTH
v. } Ejectment.
JOHN REYNOLDS et als.

This day came the plaintiff, by his attorneys, and filed his declaration in ejectment herein, together with the notice in writing thereto attached, and upon reading and filing an affidavit of a due service of a true copy of said declaration and notice upon said defendants, it is
14 14 ordered, on motion of said plaintiff, by his said attorneys, that defendants plead thereto in twenty days, or that their default be entered.

And afterwards, to wit, on the 19th day of July, A. D. 1855, the above-named defendants, by C. Ballance, their attorney, filed with the clerk of said Circuit Court for the Northern District of Illinois, their plea in the above-entitled cause, in the words and figures following, to wit:

ROBERT FORSYTH
v. } In Ejectment.
JOHN REYNOLDS et al.

15 15 Said defendant comes and says he is not guilty of the trespass and ejectment in said declaration charged against him, in manner and form as the same are therein set forth and alleged against him. And of this he puts himself upon the country, &c.

C. BALLANCE,
Defendants' Attorney.

Indorsed: Filed July 19th, 1855. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 20th day of July, in July term, A. D. 1855, of said court for the Northern District of Illinois, in the record of the proceedings thereof in the above-entitled cause, is the following entry, to wit:

ROBERT FORSYTH
v. } Ejectment.
JOHN REYNOLDS, JOSIAH E. MCCLURE.

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6 By agreement of the parties, by their attorneys, it is ordered by the court, that this cause be continued until the next term.

And afterwards, to wit, on the 4th day of February, A. D. 1856, of the December term, A. D. 1855, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

ROBERT FORSYTH
v.
JOHN REYNOLDS, JOSIAH E. MCCLURE. } Ejectment.

Now at this day came the parties, by their attorneys, and upon
issue joined, by agreement of the parties, by their attorneys, they
17 waive the intervention of a jury, and for trial put themselves upon
the court; and the court, after hearing the evidence, after inspection
of the papers, and due deliberation, finds the defendants guilty of
unlawfully withholding from the possession of the plaintiff the following
described tract of land and premises, to wit:

A part of a claim numbered seven, in the village of Peoria, in the
State of Illinois, as confirmed to Thomas Forsyth by an act of Congress,
approved March 3d, A. D. 1823, entitled An act to confirm
certain claims to lots in the village of Peoria, in the State of Illinois,
18 commencing at a point on First street, eighty-two feet from the most
easterly corner of said claim, being the corner upon First street and
the cross street B, thence along First street, and the southwesterly
line of said claim, seventy-eight feet; thence on a line parallel with
the line dividing lots two and three, in block No. fifty, in Bigelow &
Underhill's addition to Peoria, and forty feet therefrom, one hundred
and ten feet, to Water street, as laid off in said addition; thence
along Water street towards the cross street B, seventy-eight feet;
19 thence on a line parallel with the line dividing lots one and two, in
in said block fifty, in Bigelow & Underhill's addition, and twenty-two
feet therefrom, one hundred and one feet, to the place of beginning.
It being a part of lots two and three, in block fifty, in Bigelow
& Underhill's addition, and being seventy-eight feet on Water
street, running the same width to First street, in the county of Peoria
and State of Illinois.

The court also finds the estate established in the plaintiff, on the
trial, to be an estate in fee simple, and assesses the damages of
20 the plaintiff at the sum of one cent. It is thereup considered and
adjudged by the court, that the plaintiff have and recover of and
from the said defendants possession of the land and premises above
described, according to the force, form, and effect of his said recovery.
And that he have a writ of possession therefor, and that he also have
and recover of the said defendants the said sum of one cent, his
damages, as aforesaid, together with his costs, by him about his suit
in this behalf expended, amounting to the sum of dollars and
cents, and that he have execution therefor.

21 And afterwards, to wit, on the 12th day of February, A.D. 1856,
as yet of said December term, A.D. 1855, of said court, in the record
of the proceedings thereof in said entitled cause, is the following
entry, to wit:

ROBERT FORSYTH
v. } Ejectment.
JOHN REYNOLDS, JOSIAH E. McCLURE.

It appearing satisfactorily to the court, that the costs taxed in this cause have been paid, it is thereupon considered by the court, on motion of the defendants, by their attorney, that the judgment rendered herein against the defendants, on the 4th day of February
22 instant, be set aside and vacated, and a new trial of the cause granted under the statute.

And afterwards, to wit, on the 23d day of July, of the July term, A.D. 1856, of said court, in the record of the proceedings thereof in the above-entitled cause, is the following entry, to wit:

ROBERT FORSYTH
v. } Ejectment.
JOHN REYNOLDS, JOSIAH E. McCLURE.

Now at this day came the parties, by their attorneys, and upon issue joined, thereupon came a jury of good and lawful men, to wit: Daniel Bedee, Elisha Putnam, Rufus Ordway, David J. Mixer, William McKee, Thomas Barnett, William Henry, Peter Stout, Daniel
23 P. Holt, M. Tagart, John Brown, and D. Johnson, who were duly elected, tried, and sworn; and after hearing the evidence, the jury returned the following verdict into court, to wit: We, the jury, find the defendants guilty of unlawfully withholding from the possession of the plaintiff, the land and premises described in his declaration, being those certain premises situated at and within the county of Peoria, and State of Illinois, and described as follows, to wit:

A part of claim numbered seven, in the village of Peoria, in the State of Illinois, as confirmed to Thomas Forsyth by an act of Con-
24 gress, approved March 3d, A.D. 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois, commencing at a point on First street, eighty-two feet from the most easterly corner of said claim, being the corner upon First street and the cross street "B;" thence along First street and the southwesterly line of said claim seventy-eight feet; thence on a line parallel with the line dividing lots two and three, in block No. fifty, in Bigelow &
25 Underhill's addition to Peoria, and forty feet therefrom, one hundred and ten feet, to Water street, as laid off in said addition; thence along Water street towards the cross street "B," seventy-eight feet; thence on a line parallel with the line dividing lots one and two, in said block fifty, in Bigelow & Underhill's addition, and twenty-two feet therefrom, one hundred and one feet, to the place of beginning. It being a part of lots two and three, in block fifty, in Bigelow & Underhill's addition, and being seventy-eight feet on Water street, running the same width to First street. We also find the estate established in the plaintiff on the trial, to be an estate in fee simple,

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and we assess the damages of the plaintiff at the sum of one cent. 26 It is thereupon considered and adjudged by the court, that the 26 plaintiff have and recover of and from the defendants possession of the said described land and premises, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the defendants the said sum of one cent, his damages, so as aforesaid assessed, together with his costs by him about his suit in this behalf expended, amounting to the sum of dollars and cents, and that he have a 27 writ of execution therefor. 27

And afterwards, to wit: on the 6th day of August, A.D. 1856, said defendants, by their attorney, filed in said Circuit Court, with the clerk thereof, their bill of exceptions, in the words and figures following, to wit:

ROBERT FORSYTH
v.
JOHN REYNOLDS, JOSIAH E. McCLURE. } In Ejectment.

Be it remembered, that on the trial of this cause, the plaintiff, to maintain the issue on his part, introduced in evidence

1st. The act of Congress of May 15th, 1820, for the relief of the inhabitants of the village of Peoria, in the State of Illinois. 28 2

2d. The act of Congress of March 3d, 1823, on the same subject.

3d. He offered in evidence a part of Cole's report, made to the secretary of the treasury, respecting Peoria French claims, as the same is found in a printed volume of American State Papers, purporting to have been prepared by Walter Lowry, pursuant to a resolution of the Senate, and printed by Duff Green, volume 3d. To the reading of which defendant objected, because no law was shown making said printed volume evidence; which objection was overruled by the court, and a part of said report was read from said volume to the jury, referring to this claim. 2 29

4th. He then offered a connected plat of the French claims at Peoria, as they were surveyed by order of the surveyor-general of Illinois and Missouri, and also a separate plat of lot seven, claimed by Thomas Forsyth, according to said report. Which plats were approved by the said surveyor-general on the first day of September, A.D. 1840, and they together showed that by said survey, said lot seven was surveyed so as to include the property in controversy. Said surveys were authenticated by the surveyor-general, and not 3 by the secretary of the treasury, or commissioner of the General 30 Land Office.

The authentication was in the following words, to wit:

(For plat, see original, page 13.)

Claim No. 7.

Situate in the southeast fractional quarter of fractional section 9, in fractional township 8 north, of the base line, range 8 east, of the 4th principal meridian.

Plat and description of the survey of a lot in the new village of Peoria, in the State of Illinois, confirmed to Thomas Forsyth, by an act of Congress, approved the 3d of March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois." It being No. 7 of the report made by the register of the land office at Edwardsville, in pursuance of an act of Congress, approved the 15th of May, 1820, entitled "An act for the relief of the inhabitants of the village of Peoria, in the State of Illinois."

Description.

Commence at a post at the intersection of the S. W. edge of the cross street B. with the N. W. edge of First street, which post is the east corner of this lot; thence with the N. W. edge of First street, S. 43½° W. 40 feet, a post and stone set by it, 235 feet 3 inches and ⅓ of an inch, to a post, the east corner of the survey of claim No. 14, 320 feet 10 inches, the south corner of this lot, and of the survey of claim No. 14, and the east corner of lot No. 2; thence N. 46½° W. 320 feet 10 inches, to a post in the S. E. edge of Second street, the west corner of this lot, and of the survey of claim No. 14, and north corner of lot No. 2; thence with the S. E. edge of Second street, N. 43½° E. (85 feet 6 inches and ⅔ of an inch, to a post, the north corner of the survey of claim No. 14) 320 feet 10 inches, to a post, at the intersection of the S. E. edge of Second street with the S. W. edge of the cross street B., which post is the north corner of this lot; thence with the S. W. edge of the cross street B., S. 46½° E. 320 feet 10 inches, to the place of beginning.

This lot as surveyed and here described, contains 102,933 square feet, and $\frac{93}{100}$ of a square foot, and includes the survey of the claim No. 14 confirmed to Jacques Mette, as represented on the plat.

Surveyed on the 29th of April, 1837, by Joseph C. Brown, deputy surveyor, under instructions from Daniel Dunklin, surveyor of public lands in the States of Illinois and Missouri, bearing date the 11th of April, 1837.

Examined and approved, this first day of September, 1840.

(Signed) WILLIAM MILBURN,
Surveyor of the Public Lands in the States
of Illinois and Missouri.

OFFICE OF THE SURVEYOR-GERERAL FOR ILLINOIS AND MISSOURI.
ST. LOUIS, 19th September, 1854.

I, John Loughborough, surveyor-general for Illinois and Missouri, do hereby certify, that the foregoing is correctly copied from page 7 of the book of records of surveys in Peoria, Illinois, in this office.

JNO. LOUGHBOROUGH,
Surveyor-General.

(For plat, see original, page 16.)

Plat of the new village of Peoria, and such of the out lots and field 36
lots in the neighborhood thereof as are connected with said new village, in one continuous survey, and description of the boundaries of the said town, and continued connection of out lots and field lots situate on sections 9 and 16, township 8 north of the base line, range 8 east, of the 4th principal meridian.

Description.

Begin at the upper end of the southeastern edge of First street, on the northwest bank of Lake Peoria; thence N. 46½° W. one hundred feet, to the eastern corner of unclaimed lot A., 420 feet 10 inches, 37
the north corner of said unclaimed lot A., at the northeast end of the S. E. edge of Second street, 486 feet 10 inches, to the N. E. end of the N. W. edge of Second street; thence S. 43½° W. with the N. W. edge of Second street, 256 feet 8 inches, to the intersection with the N. E. edge of street A.; thence N. 46½° W. with the N. E. edge of street A., 320 feet 10 inches, to the N. W. end of the N. E. edge 38
of said street A.; thence S. 43½° W. 66 feet, to the north corner of lot No. 66, at the N. W. end of the S. W. edge of said street A., 108 feet 9⅓ inches, the west corner of lot No. 66 and north corner of unclaimed lot C., 322 feet 8 inches, the west corner of unclaimed lot C. and the north corner of lot No. 12, 408 feet 2⅔ inches, the west corner of lot No. 12 and the N. W. end of the N. E. edge of 39
street B., 474 feet 2⅔ inches, the N. W. end of the S. W. edge of street B. and the north corner of lot No. 8, 709 feet 6 inches, the north corner of lot No. 15, 795 feet and ⅔ of an inch, to the west corner of lot No. 8, which is also the west corner of lot No. 15, and east corner of lot No. 61, and north corner of lot No. 28; thence N. 46½° W. with the N. E. boundary of lot No. 61, 15 chains and 40 40
links, to the north corner of lot No. 61; thence with the N. W. boundary of lot No. 61, S. 43½° W. 5 chains and 52¼ links, to the west corner of lot No. 61; thence with the S. W. boundary of lot No. 61, S. 46½° E., 4 chains and 94 links, to the north corner of lot No. 51, at the intersection of the N. W. boundary thereof with the S. W. boundary of lot No. 61; thence with the N. W. boundary of 41
lot No. 51, S. 43½° W. 4 chains and 88 links, to the west corner of lot No. 51; thence with the S. W. boundary of lot No. 51, S. 46½° E. 6 chains and 10 links, to the north corner of lot No. 40, at the intersection of the N. W. boundary thereof with the S. W. boundary

of lot No. 51; thence with the N. W. boundary of lot No. 40, S. 43½° W. 3 chains and 23⅓ links, to the west corner of lot No. 40; thence with the S. W. boundary of lot No. 40, S. 46½° E. 4 chains 34 links, to the N. W. end of the N. E. edge of street E. on the S. W. boundary of lot No. 40; thence S. 43½° W. 66 feet, to the N. W. end of the S. W. edge of street E., and the north corner of unclaimed lot E. 322 feet 8 inches, to the east corner of lot No. 31, at the intersection of the N. E. boundary thereof with the N. W. boundary of unclaimed lot E.; thence with the N. E. boundary of lot No. 31, N. 46½° W. 13 chains and 16 links, to the north corner of lot No. 31; thence with the N. W. boundary of lot No. 31, S. 43½° W. 3 chains and 88 links, to the west corner of lot No. 31, at the intersection with the N. W. boundary thereof with the N. E. boundary of lot No. 37; thence with the N. E. boundary of lot No. 37, N. 46½° W. 5 chains and 5½ links, to the north corner of lot No. 37; thence with the N. W. boundary of lot No. 37, S. 43½° W. 7 chains and 66 links, to the west corner of lot No. 37; thence with the S. W. boundary of lot No. 37, S. 46½° E. 6 chains and 67½ links, to the north corner of lot No. 67, at the intersection of the N. W. boundary thereof with the S. W. boundary of lot No. 37; thence with the N. W. boundary of lot No. 67, S. 43½° W. 6 chains, to the west corner of lot No. 67; thence with the S. W. boundary of lot No. 67, S. 46½° E. 6 chains and 38 links, to the south corner of lot No. 67, on the N. W. boundary of lot No. 64; thence S. 43½° W. 1 chain and 66 links, the west corner of lot No. 64 and the north corner of lot No. 20, 7 chains and 61 links, the west corner of lot No. 20 and north corner of lot No. 48, 11 chains and 86 links, to the west corner of lot No. 48; thence with the S. W. boundary of lot No. 48, S. 46½° E. 6 chains and 88 links, the point of intersection of the S. W. boundary of lot No. 48 with the section line between sections 9 and 16, township 8 north, range 8 east, of the 4th principal meridian, which point is 13 chains and 93 links N. 89½° W. of the corner of fractional sections 9 and 16, on the lake, 8 chains, to the south corner of lot N. 48; thence with the S. E. boundary of lot No. 48, N. 43½° E. 1 chain and 6 links, the point of intersection of the S. E. boundary of lot No. 48 with the section line between sections 9 and 16, township 8 north, range 8 east, of the 4th principal meridian, which point is 12 chains and 38 links N. 89½° W. of the corner to fractional sections 9 and 16, on the lake, 4 chains and 25 links, to the east corner of lot No. 48, on the S. W. boundary of lot No. 20; thence with S. W. boundary of lot No. 20, S. 46½° E. 2 chains, to the south corner of lot No. 20; thence N. 43½° E. 5 chains and 95 links, the east corner of lot No. 20 and south corner of lot No. 64, 13 chains and 61 links, the east corner of lot No. 64 and south corner of lot No. 43, 21 chains and 27 links, to the east corner of lot No. 43 and south corner of lot No. 34, at the S. W. end of the N. W. edge of Second street; thence S. 46½°

E. 66 feet, the S. W. end of the S. E. edge of Second street, and west corner of lot No. 33, 386 feet 10 inches, the south corner of lot No. 33, 491 feet 1⅓ inches, to the lower end of the S. E. edge 49 of First street, on the N. W. bank of Lake Peoria; thence along the N. W. bank of Lake Peoria the following courses and distances: N. 38° E. 176 links; thence N. 42° E. 432 links; thence N. 17¾° E. 150 links; thence N. 78° E. 72 links; thence N. 47½° E. 417 links; thence N. 37° E. 188 links; thence N. 44¾° E. 2448 links, 50 to the place of beginning.

Then for connection with the public surveys run from said place of beginning along the N. W. bank of Lake Peoria the following courses and distances: N. 44¾° E. 1081 links; thence N. 50¾° E. 1300 links, to the point of intersection of the section line between sections 9 and 10 with the N. W. bank of Lake Peoria, which point is 2406 links S. 0° 30′ W. of the corner to sections 3, 4, 9, and 10, 51 township 8 north, range 8 east, of the 4th principal meridian. Also from the lower end of the S. E. edge of First street the following courses and distances along the bank of the lake were taken for connection: S. 51¾° W. 198 links; thence S. 39° W. 819 links; thence S. 41¼° W. 216 links; thence S. 49½° W. 287 links; thence S. 85° 52 W. 116 links, to the point of intersection of the section line between sections 9 and 16, township 8 north, range 8 east, of the 4th principal meridian, which point is 2510 links S. 89° 30′ E. of the corner to sections 8, 9, 16, and 17, of said township.

Surveyed on the several days designated in the foregoing separate descriptions of the lots, by Joseph C. Brown, deputy surveyor, under instructions from Daniel Dunklin, surveyor of the public lands in the States of Illinois and Missouri, bearing date the 11th of April, 53 1837.

Examined and approved, this first day of September, 1840.

WILLIAM MILBURN,
Surveyor of the Public Lands in the States
of Illinois and Missouri.

OFFICE OF THE SURVEYOR-GENERAL FOR ILLINOIS AND MISSOURI.
SAINT LOUIS, January 31st, 1854

I certify that the foregoing plat of the new village of Peoria, and of such of the out lots and field lots in the neighborhood thereof as are connected with said new village in one continuous survey and description of the out boundaries of the said town, and continued connection of out lots and field lots, situate on sections 9 and 16, 54 township 8 north of the base-line, range 8 east of the 4th principal meridian, are correctly copied from the records of the surveys of Peoria, pages 79 and 80, preserved in this office.

JNO. LOUGHBOROUGH,
Surveyor-General.

To the introduction of said plats defendant objected, because they were not certified from the proper office, but the court overruled said motion, and said plats were given in evidence to the jury.

5th. He then offered in evidence a patent to the legal representatives of Thomas Forsyth, to which defendant objected, but the court overruled said objections, and said patent was given in evidence to the jury, which is as follows, to wit:

The United States of America, to all to whom these presents shall come, greeting: Whereas, there has been deposited in the General Land Office a certificate, numbered sixteen, of the register and receiver at the land office, at Edwardsville, Illinois, whereby it appears, that in the report, dated 10th November, 1820, of Edward Coles, register of the land office at Edwardsville, Illinois, the claim of Thomas Forsyth, under John Baptist Maillet, and in right of his own occupancy and cultivation, is entered as number seven; and whereas, it further appears from the certificate aforesaid, that the said John Baptist Maillet is the inhabitant or settler within the purview of the confirmatory act of Congress, approved 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," and that it has appeared to the satisfaction of the said register and receiver, that the said inhabitant or settler did not, prior to the said act of the 3d March, 1823, receive a confirmation of claim or donation of any tract of land, or village lot, from the United States, and that the legal representatives of the said Thomas Forsyth, under said Maillet, in virtue of the confirmatory act aforesaid, are entitled to a patent for a certain lot described as follows, to wit: The lot containing one hundred and two thousand nine hundred and thirty-three square feet, and ninety-three hundredths of a square foot, surveyed and designated as covered by said claim number seven, excluding therefrom the tract or portion of said lot containing twenty-seven thousand four hundred and forty-nine square feet, and seven hundredths of a square foot, covered by claim numbered fourteen, of Jacques Mette, also under said Maillet, said claim, number seven, being situated in the southeast fractional quarter of fractional section nine, in township eight north, of range eight east, of the fourth principal meridian, Illinois, according to the survey, approved 1st September, 1840, by the surveyor of the public lands, in the States of Illinois and Missouri; and whereas, in the confirmatory act aforesaid, of the 3d March, 1823, it is provided, that "nothing in this act contained shall be so construed as to affect the right, if any such there be, of any other person or persons to the said lots, or any part of them, derived from the United States, or any other source whatever," &c. Now know ye, that in consideration of the premises, and pursuant to the second section of the act aforesaid, of the 3d March, 1823, there is granted by the United States to the

legal representatives of the said Thomas Forsyth, and to their heirs, subject to the proviso aforesaid, the lot of land above described, as covered by the said claim number seven, but expressly excluding there- 660
from the portion of the said lot covered by claim number fourteen aforesaid, to have and to hold the said lot of land, with the appurtenances, unto the said legal representatives of Thomas Forsyth, and to their heirs and assigns forever, subject to the proviso and exclusion aforesaid.

In testimony whereof, I, James K. Polk, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixteenth day of December, in the year of our Lord one 661
[SEAL.] thousand eight hundred and forty-five, and of the Independence of the United States the seventieth.

By the President, JAMES K. POLK.

By J. KNOX WALKER,
Sec'y.

S. H. LAUGHLIN,
Recorder of the General Land Office.

Recorded vol. 10, pages 97 and 98.

6th. He then read in evidence an agreement, signed by the attorneys of the parties, which is as follows:

FORSYTH
v.
BRYAN AND ROUSE.

SAME
v.
REYNOLDS.

SAME
v.
MCCLURE.

SAME
v.
KELLOGG.

It is agreed, that upon the trial of the above cases, that it shall be admitted that the plaintiff has the title of Thomas Forsyth in 662
and to the land sued for, by descent, and purchase and conveyance, and also that the defendants have had the actual possession of the land for which they are respectively sued, by residence thereon for ten years next preceding the commencement of these suits; and that John L. Bogardus, under whom they claim, had possession of part of the S. E. fractional quarter of section nine, in township

eight north, of range eight east, upon which the land sued for is situated, claiming the same, under pre-emption right, more than twenty years before the commencement of these suits, but he never had the actual possession of that part of said fractional quarter section sued for in these actions; and that said defendants respectively had vested in them, before the commencement of this suit, all the right, title and interest, which said Bogardus's possession, pre-emption right, and patent conferred on him.

WILLIAMS & LAWRENCE,
Att'y for Pl'ff.
C. BALLANCE,
Attorney for Defts.

Defendant then, to maintain the issue on his part, introduced in evidence—

1st. A letter and certificate of Samuel Alexander, register of the land office at Quincy, which are as follows:

LAND OFFICE, QUINCY, ILLINOIS,
November 17th, 1832.

SIR:

Yours of the 31st ultimo was duly received, and, in reply thereto, I have to say that your proof of a pre-emption has been duly received previous to the 5th of October, partly by Mr. Bigelow and partly by mail, which were adjudged in this office to be sufficient.

Very respectfully your humble and obedient servant,
SAMUEL ALEXANDER.

JOHN L. BOGARDUS, Esq.

LAND OFFICE, QUINCY,
January 4th, 1833.

I hereby certify that on the 4th day of August, 1832, John L. Bogardus, of Peoria, in the State of Illinois, filed in this office evidence of his right of pre-emption to the southeast fractional quarter of section nine, in township eight north, range eight east, of the fourth principal meridian, under the act of Congress of April 5th, 1832.

SAMUEL ALEXANDER,
Register.

2d. He offered a certificate of entry, which is as follows:

LAND OFFICE, QUINCY, ILLINOIS,
15th November, 1837.

It is hereby certified that John L. Bogardus, of New York, did this day enter or purchase the southeast fractional quarter of section No. nine, in township No. eight north, range No. eight east, of the fourth principal meridian, containing twenty-three 93–100 acres, as appears of record in this office.

SAMUEL LEECH,
Register.

3d. He then introduced a patent from the United States to John L. Bogardus, which is as follows:

Certificate No. 13,258.

The United States of America to all to whom these presents shall come, greeting.

Whereas, John L. Bogardus, of New York, county New York, has deposited in the General Land Office of the United States, a certificate of the register of the land office at Quincy, whereby it appears that full payment has been made by the said John L. Bogardus, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the southeast fractional quarter of section nine, in township eight north, of range eight east, in the district of lands subject to sale at Quincy, Illinois, containing twenty-three acres and ninety-three hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor-general, which said tract has been purchased by the said John L. Bogardus. Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said John L. Bogardus, and to his heirs, the said tract above described, to have and to hold the same, together with all and singular the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said John L. Bogardus, and to his heirs and assigns forever, subject however to all the rights of any and all persons claiming, under the act of Congress of 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois."

In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

[SEAL.] Given under my hand at the city of Washington, the fifth day of January, in the year of our Lord one thousand eight hundred and thirty-eight, and of the independence of the United States the sixty-second.

By the President, MARTIN VAN BUREN.

By A. VAN BUREN,
Secretary.

Recorded vol. 1, page 149.

H. M. GARLAND,
Recorder of the General Land Office.

Defendant then asked the court to instruct the jury, that the title introduced by defendant is a better legal title than that introduced by the plaintiff, and that consequently plaintiff cannot recover in this action.

That if defendants have, in the opinion of the jury, been in the actual possession of said premises more than seven years, under the deed from Bogardus to Underhill, that the plaintiff cannot recover in this action. Which instructions the court refused to give, but instructed the jury:

1st. That the entry and patent of Bogardus, dated January 5th, 1838, for the fractional quarter section mentioned therein, were subject to the rights of any and all persons claiming under the act of Congress of March 3d, 1823, so that no one claiming under the patent, and by virtue thereof, could claim, under the statutes of limitations for seven years, to have entered into the possession, under claim or color of title, of lot 7. The patent to Bogardus did not cover, and was not intended to cover, lot 7, granted by the act of 1823.

2d. That if that part of lot 7, in controversy in this case, was entered by the defendants, and those through whom they claimed, and the possession held under a title subject to the title of these French claims, as granted by the act of 1823, they cannot be said to have entered and be possessed adversely, so as to be protected by the statutes of limitations.

3d. That the statutes of limitations could not begin to run before Sept. 1st, 1840, when the survey was approved.

4th. If the defendants, or those under whom they claim, have been possessed of the land, under a title adverse or in hostility to the title of these French claims, under the act of 1823, for seven successive years, and had paid the taxes for that time, they might be protected under the statutes.

To all of which instructions, rulings, and decisions, defendant then and there excepted, and prayed that this his bill of exceptions, be sealed, signed, and made of record, which is done.

It was further agreed that the property in controversy was, at the time of the commencement of this suit, worth more than two thousand dollars. And the above was all the evidence in the case.

Exceptions allowed.

THOMAS DRUMMOND. [SEAL.]

Indorsed: Filed August 6th, 1856. Wm. H. Bradley, clerk.

And on the 29th day of July, 1856, the said defendants, by their attorney, filed in said court, with the clerk thereof, their writ of

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error in the above-entitled cause, in the words and figures following, to wit:

United States of America, Northern District of Illinois, *ss.*

The United States of America, to the judges of the Circuit Court of the United States of the Northern District of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between 75 Robert Forsyth against John Reynolds and Josiah E. McClure, a manifest error hath happened, to the great damage of the said John Reynolds and Josiah E. McClure, as by their complaint appears; and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf; you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this 76 writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this 28th day of July, A.D. 1856, and 77 of our independence the 81st year.

WM. H. BRADLEY,
Clerk.

Indorsed: Filed July 29th, 1856. Wm. H. Bradley, clerk.

Northern District of Illinois, *ss.*

I, William H. Bradley, clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify, the foregoing transcript to be a true, full and perfect copy from the record, of all the proceedings which have been had in said court, in said cause of Robert Forsyth *v.* John Reynolds and Josiah E. McClure, as the same now appears in my office.

In testimony whereof, I have hereunto set my hand and 78 affixed the seal of said court, at my office in Chicago, in said Northern District, this twenty-fifth day of October, A.D. 1856.

[SEAL.]

WM. H. BRADLEY,
Clerk.

And said plaintiff in error comes, when, &c., and says, that in said record and proceedings, manifest error hath occurred in this, to wit:

1st. Said court erred in permitting said plaintiff below to read in evidence, to the jury, a portion of said printed book.

2d. Said court erred in permitting to be given in evidence to the jury, said plats, without a proper authentication.

3d. The said court erred in permitting said patent to the legal representatives of said Forsyth to be read in evidence, to the jury.

4th. Said court erred in refusing the instructions, asked by the defendant below, to be given to the jury.

5th. Said court erred in giving to said jury the instructions that were given to it by said court.

6th. Said judgment ought to have been in favor of the defendant below, and not in favor of plaintiff below.

For all of which errors, and others apparent upon said record, he prays that said judgment may be disannulled, set aside, and for nothing held.

C. BALLANCE,
For Plaintiff in Error.

Circuit Court of the United States, Northern District of Illinois, *sct.*

ROBERT FORSYTH *v.* JOHN REYNOLDS and JOSIAH E. MCCLURE.	Ejectment.

Be it remembered, that on the eighteenth day of July, in the year of our Lord one thousand eight hundred and fifty-nine, a writ of error in the above-entitled cause was sued out of the office of the clerk of the Circuit Court of the United States, for the Northern District of Illinois, which said writ, together with the bond in appeal filed therein, reads as follows, to wit:

United States of America, Northern District of Illinois, *ss.*

The United States of America, to the judges of the Circuit Court of the United States for the Northern District of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Robert Forsyth and against John Reynolds and Josiah E. McClure, a manifest error hath happened, to the great damage of the said John Reynolds and Josiah E. McClure, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington the first Monday of

December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

[L. S.] Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this fourteenth day of July, in the year of our Lord one thousand eight hundred and fifty-nine, and of our independence the 84th year.

WM. H. BRADLEY,
Clerk.

Indorsed: Filed July 18th, 1859. Wm. H. Bradley, clerk.

Bond.

JOHN REYNOLDS and JOSIAH E. McCLURE
v.
ROBERT FORSYTH.

In Error to the United States Circuit Court for the Northern District of Illinois. July Term, A.D. 1859.

Know all men by these presents, that we, Charles Ballance and Samuel Voris, are held and firmly bound unto the above-named Robert Forsyth in the sum of two hundred dollars, to be paid to the said Robert Forsyth and to executors or administrators. To which payment, well and truly to be made, we bind ourselves and each of us, our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this 11th day of July, 1859. Provided, however, and this obligation is upon the express condition that whereas the above-named John Reynolds and Josiah E. McClure have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by said Circuit Court in the above-entitled cause in favor of said Forsyth. Now, therefore, the condition of this obligation is such, that if the above-named John Reynolds and Josiah E. McClure shall prosecute their said writ of error to effect, and shall pay all costs if they shall fail to make good their plea, then this obligation to be void; otherwise, the same shall be and remain in full force and virtue.

C. BALLANCE. [SEAL.]
SAMUEL VORIS, [SEAL.]
By his attorney in fact.
C. BALLANCE. [SEAL.]

Signed, sealed, and delivered,
in presence of

Indorsed: Approved. Thomas Drummond. Filed July 18, 1859. Wm. H. Bradley, clerk.

And afterwards, to wit, on the twenty-second day of July, in the year of our Lord one thousand eight hundred and fifty-nine, a citation issued in said cause, which, with the acknowledgment of service indorsed thereon, was filed in the office of the clerk of the Circuit Court of the United States for the Northern District of Illinois, reads as follows, to wit:

Citation.

United States of America, *ss.*

To Robert Forsyth, greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of Illinois, wherein John Reynolds and Josiah E. McClure are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, one of the justices of said court, this fourteenth day of July, 1859.

THOMAS DRUMMOND.

I acknowledge service of the above citation this 22d day of July, 1859.

ARCHIBALD WILLIAMS,
Attorney for Defendant in error.

Indorsed: Filed July 22, 1859. Wm. H. Bradley, clerk.

Northern District of Illinois, *ss.*

I, William Bradley, clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify that the above and foregoing is a full, true, and complete transcript of the writ of error sued out in the case wherein Robert Forsyth was plaintiff and John Reynolds and Josiah E. McClure defendants, together with the bond and citation filed therein, as the same appear from the originals now on file in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at office in the city of Chicago, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and fifty-nine, and of our independence the eighty-fourth year. [SEAL.]

WM. H. BRADLEY,
Clerk.

Indorsed: N. Illinois C. C. U. S. No. 80. John Reynolds and Josiah E. McClure, plaintiffs in error, *v.* Robert Forsyth. Filed 3d Oct., 1859.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JOHN REYNOLDS, AND
JOSIAH E. McCLURE,
VS.
ROBERT FORSYTH.

DECEMBER TERM,
1860.

NO. 80.

Ejectment, brought in the Circuit Court of the United States for the Northern District of Illinois, by the defendant in error, against plaintiffs in error, for the recovery of part of claim number seven, in the village of Peoria, in the State of Illinois, confirmed to Thomas Forsyth by an act of Congress of the 3d of March, 1823, entitled "an act to confirm certain claims to lots in the village of Peoria, in the State of Illinois.

The declaration was served November 18, 1854, and filed in Court December 23, 1854.

General issue plea, filed July 19, 1855.

Case tried by a jury July 23, 1856. Verdict and judgment for plaintiff same day.

Bill of exceptions allowed and filed August 6, 1856. After giving a history of the trial, it concludes as follows, to wit:

"To all of which instructions, rulings and decisions, the "defendant then and there excepted, and prayed that this his "bill of exceptions be sealed, signed and made of record."

This is the only exception noted anywhere on the record.

The plaintiff read in evidence the act of Congress of May 15, 1820, for the relief of the inhabitants of the village of Peoria, in the State of Illinois; the report of Edward Coles, made in pursuance thereof; the said act of Congress of the 3d of March, 1823; a general and special plat of the survey, approved by the Surveyor-General of the States of Illinois and Missouri September 1, 1840, in pursuance of said act of Congress; and a patent for said premises to the legal representatives of Thomas Forsyth, dated December 16, 1845.

It was admitted that the plaintiff had the title of Thomas Forsyth.

The defendant claimed the premises under a patent dated January 5, 1838, granting the S. E. qr. 8 N. 8 E. (which includes the lands sued for) to John L. Bogardus, "subject, however, to all the rights of any and all persons claiming under the act of Congress of 3d March, 1823, entitled an act to confirm certain claims to lots in the village of Peoria, in the State of Illinois.

It was agreed that the defendant had the actual possession of the land sued for, by residence thereon, for ten years next preceding the commencement of the suit; and that John L. Bogardus, under whom he claimed, had possession of part of the S. E. qr. 8 N. 8 E., claiming the same under pre-emption right, more than twenty years before the commencement of this suit, but he never had the actual possession of the land sued for; and that the said defendant had vested in him, before the commencement of this suit, all the right, title and interest which said Bogardus' possession, pre-emption right and patent conferred on him.

As to the instructions refused and given, see printed record, p. 15.

I.

It does not appear that any of the decisions of the Court were excepted to when made. This should appear affirmatively; and if there is any ambiguity or uncertainty in the bill of exceptions, it should be construed most strongly against the plaintiff in error — it being regarded as his pleading.

4 Scam. 557, 419; 11 Illinois R. 73, 586;
12 Illinois R. 74, 87, 379;
13 Illinois R. 85, 341, 530, 570, 633. 699;
14 Illinois R. 58; 1 Scam. 165, 252; 3 Scam. 61;
2 Gilm. 725, 285; 3 Gilm 366; 5 Gilm. 209.

II.

The exceptions noted in this case are vague and nugatory.

15 Curtis 537, 179; 9 Curtis 3; 13 Curtis 127;

III.

The possession of the defendant below was not adverse to the title of the plaintiff.

Ballance vs. Tyson, 12 Illinois R. 332;

13 Howard 24 ; 19 Howard 338 ; 16 Curtis 120, 149 ;
Til. Adams on Ejectment, 46, 463, note ; 6 Curtis 52 ;
15 Illinois R. 273 ; 2 J. J. Marsh 169-70 ;
9 John. 180 ; 10 John. 440 ; 20 John. 306 ;
3 Wend. 337 ; 15 Mass. 492 ; 9 Mass. 508 ; 1 Pick. 327 ;
2 Wend. 557, 368 ; 4 Dess. 474 ; 5 Cowen 130-4, 350-1 ;
2 Wend. 166 ; 5 Har. & John. 226.

IV.

Defendant had not the kind of title required by the 7-year limitation acts of Illinois.

2 A. K. Marsh, 387 ; 11 How. 424 ; 4 Martin N. S. 224 ;
4 Bibb 461 ; 3 A. K. Marsh 58 ; 5 Pet. 668 ;
2 Pet. 241 ; 5 Cowen 350-1.

WILLIAMS, *Atty. for Defendant.*

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SUPREME COURT OF THE UNITED STATES.

No. ~~236~~. 81 19/14.

CHARLES G. TAYLOR AND HENRY A. TAYLOR, PLAINTIFFS IN ERROR,

vs.

MARCUS MORTON, LATE COLLECTOR, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

G. S. Gideon, Printer, 511 Ninth street, Washington.

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SUPREME COURT OF THE UNITED STATES.

No. 236.

CHARLES G. TAYLOR AND HENRY A. TAYLOR, PLAINTIFFS IN ERROR,

vs.

MARCUS MORTON, LATE COLLECTOR, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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UNITED STATES, *ss.*

[L. S.]

The President of the United States to the Judges of the Circuit Court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Charles G. Taylor and Henry A. Taylor, of the city and State of New York, plaintiffs, and Marcus Morton, late collector of the port of Boston and Charlestown, defendant, in a plea of the case a manifest error has intervened, to the great damage of the said Charles and Henry, as in their complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Roger B. Taney, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this third day of December, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States the eighty-third.

H. W. FULLER, *Clerk.*

Allowed by—

P. SPRAGUE,
Judge of U. S., Mass. Dist.

UNITED STATES OF AMERICA,
Circuit Court of the U. S.,
Massachusetts District, ss.

And now here the judges of the circuit court of the United States in and for the said district make return of this writ by annexing hereto, and sending herewith, as within commanded, and under the seal of said court, a true and attested copy of the record, process, and proceedings in the case of Charles G. Taylor and

Henry A. Taylor against Marcus Morton, determined in said circuit court, with the citation, and a copy of the bond given when the within writ of error was allowed.

In testimony whereof, I, Henry W. Fuller, clerk of the said circuit court of the United States, have hereunto set my hand and the seal of said court, this 24th day of September, in the year of our Lord one thousand eight hundred and fifty-nine.

[L. S.]

H. W. FULLER, *Clerk.*

UNITED STATES OF AMERICA,
Circuit Court of the United States,
Massachusetts District, ss.

To Marcus Morton, late Collector of the port of Boston and Charlestown, esquire, greeting:

You are hereby cited and admonished to be and appear before the Chief Justice and associate justices of the Supreme Court of the United States, on the first Monday of December next, A. D. (1859,) at Washington, the present seat of the national government, then and there to answer to a writ of error this day sued out of the clerk's office of the circuit court of the United States for the first circuit and district of Massachusetts, wherein Charles G. Taylor and Henry A. Taylor, of New York, are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this third day of December, A. D. one thousand eight hundred and fifty-eight.

P. SPRAGUE,
Judge of the United States
for the District of Massachusetts.

UNITED STATES OF AMERICA,
Mass. Dist., ss.

Boston and Taunton, September 15th, 1859.

I certify that I have notified the within named Morton by leaving at his last and usual place of abode a true and attested copy hereof.

WATSON FREEMAN,
U. S. Marshal.

Service..........	$2 00
Copy.............	1
Expenses........	4
	$7 00

United States of America,
Massachusetts District.

At a circuit court of the United States, begun and holden at Boston, within and for the first circuit and district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty-five, before the Hon'ble Benjamin R. Curtis, associate justice; the Hon'ble Peleg Sprague, district judge.

Charles G. Taylor and Henry A. Taylor, both of the City, County, and State of New York, Plaintiffs,
versus
Marcus Morton, of Boston, in the district of Massachusetts, Collector of the Customs for the Port of Boston and Charlestown, Defendant.

In a plea of the case, for that the said defendant, at Boston aforesaid, on the day of the purchase of this writ, being indebted to the plaintiffs in the sum of two thousand dollars for money had and received by him, under color of the laws of the United States, for the collection of duties, and paid under plaintiffs' protest and for the plaintiffs' use, then and there, in consideration thereof, promised the the plaintiffs to pay them said sum on demand; yet the said defendant, though often requested, hath never paid the same, but neglects and refuses so to do, to the damage of the plaintiffs, as they say, the sum of two thousand dollars.

This action was entered at the May term of this court, A. D. 1847, and was thence continued from term to term to the May term, A. D. 1854, when the general issue was pleaded by the defendant, and joined by the plaintiffs; and thereupon a jury having been duly sworn, and the evidence having been all in on both sides, it was agreed that the case should be taken from the jury and submitted to the court, with authority to draw all such inferences of fact as a jury would be authorized to draw from the evidence, and that a verdict should be entered and judgment should be rendered for the plaintiffs, or defendant, as the court should think proper upon the law and the evidence. The case was thereupon withdrawn from the jury, and a report of the evidence was made and placed on file, and submitted to the court as follows, viz:

This is an action of indeb assumpsit for money had and received, brought against the defendant, as colletor of the customs, in the city of Boston, in said district, in which the damages are laid at two thousand dollars; the claim made being for recovery back of an excess paid by the plaintiffs in the duties assessed by the defendant upon a quantity of Russian hemp imported by them in

1846, the duty thereon being charged at forty dollars per ton; whereas, as the plaintiffs allege, it should have been charged at twenty-five dollars, that being the rate established by the tariff of 1842 upon a certain quantity of Bombay hemp, imported from India, and it being stipulated in the treaty with Russia, signed December 18, 1832, that no higher rate of duties should be imposed upon goods imported from Russia than on the like articles imported from other places. To maintain their suit the plaintiffs adduced the said treaty as printed in 8th vol. of the Laws of the United States, and particularly articles 6th and 11th; the tariffs of 1828, in which no discrimination was made between the hemp of Russia and hemps of other countries; also the tariff of 1832, in which no discrimination was made, and the tariff of 1822, in which the duty upon Russian hemp was charged at forty dollars per ton; the provision upon this subject being that on all unmanufactured hemp, excepting Manilla, Sunn, and other hemps of India, Sisal grass, coir, and other vegetable substances not enumerated, used for cordage, the duty should be forty dollars per ton, and upon those thus excepted twenty-five dollars per ton.

And the plaintiffs maintained that this tariff, in making this discrimination between the hemp of Russia and those of India, was in violation of the treaty.

In illustration of the views taken on their behalf, the plaintiffs' counsel also introduced the treaty with Sweden; also that with Greece, December 10, 1837, art. 8; that with Mexico, art. 4; and that with Portugal, art. 3; and introduced the following testimony:

William Ropes, of Boston, merchant. Had been engaged exclusively in the Russian trade for the past thirty years, exporting and importing. The chief articles of his trade for the last three years were hemp, yarns and cordage, and lately a great deal of hemp; that the importation of Russian hemp was formerly greater than at present; it had been gradually declining; that in 1832 it reached well nigh to eight thousand tons, and diminished every year until it got down to about five hundred tons; that it was superseded almost entirely by Manilla hemp; that almost all the extra consumption was Manilla, and then it superseded the Russian; that the American hemp had been substituted, and got into general use. The increased quantity of consumption had been supplied by Manilla hemp. That hemp yarns are now more generally imported under the last tariff; that he never imported hemps from India; has imported the coir rope, made of cocoa-nut. That the article from Manilla is called Manilla hemp; formerly it was called grass. It had two or three names; plantain bark was one. It was at first imported in small quantities; when it once got into general use it was found to answer all the purposes of Russian hemp, and better for running rigging; it is used for running rigging; it does

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not answer for standing rigging; it does not receive tar as well as Russian. Manilla hemp is imported very largely; sixty thousand tons in one year. Witness never imported any; that if he were to give an order for it, his order would be for Manilla hemp; that it did not answer at first, but did afterwards, and that it was more than twenty years since this had been ascertained. That, in ordering Russian hemp, his orders were for clean, outshot, half cleaned, and cordilles; that formerly half cleaned was used here for cordage, but that it is not so now; that Russian hemp is for standing rigging, and was formerly for running rigging, and that he has had vessels rigged with it in preference to Manilla; that Russian hemp is too good for bale rope; American hemp is used for that, and the refuse of Russian hemp is made into bale rope in Russia.

Upon cross-examination, he testified that Russian and American hemp are used almost entirely for standing rigging. That the Italian compares nearest with the Russian, but does not receive tar so well; that the decline in the importation of Russia hemp may be owing to introduction of American, and partly to Manilla. Cordage is the term applied to all ropes. They are called Manilla cordage and Russian cordage. That there has been an increase of importation of Russian since about four years ago, since it has been found that American hemp does not answer so well; it does not receive and retain tar so well. American hemp is going out of use and Russian coming in again. That the Russian declined to about five hundred tons, and remained so for several years, and would be soon two thousand five hundred tons, but for the yarns, which are imported and tarred here. They are assessed at 20 per cent., which accounts for importing them in place of hemp. The first year after the tariff five hundred tons were imported; the next, 700; and this year, thinks one thousand. It is merely importing Russian hemp in another shape, at a lower duty. That he knows nothing of any hemp from India, but Manilla; that no other comes into competition with Russian in any material degree; that the increase in importation of Russian is owing to finding that the American will not do; that cables are made of Russian hemp, excepting small hawsers, which are made of Manilla hemp.

Being asked how he should respond to an order for "hemp," merely, he answered: If I received an order for hemp, I should telegraph to know what sorts were wanted; how much Manilla and how much Russian. That the duty is less on manufactured cordage than on hemp, but that the tar being reckoned, made the duty on the hemp about the same; that imported Italian hemp, the objection to it is, that the tar will not remain in it, but would run out as in the American; that cables are now made of iron, and hawsers of Russian hemp.

William A. Wellman, assistant collector of the customs. He identified the entry made of the six bales of Russian hemp imported by plaintiffs 1847, and upon which the duty of forty dollars per ton was paid; and the entry of ten bales of Bombay hemp imported by 18 , upon which the duty was also charged at twenty dollars per ton. These documents make part of the case; and testified that the whole were originally charged at forty dollars, but that the difference between that rate and the rate of twenty-five dollars upon the Bombay hemp was returned by an order of the department on 5th May, 1847. He also identified the protest made by plaintiffs upon paying the duties, which also made part of the case. The defendant's counsel excepted to the production of two entries proved by witness, marked F. W., 1, 2, on the ground that they were selections merely for the purpose of this suit, and no evidence of the usual course of business at the custom-house. Witness testified that the product of Manilla is always imported as Manilla hemp; could not tell how long that had been; it used to be called plantain bark; it had been called Manilla hemp for many years. That the article of Jute is entered as Jute. That he does not know the uses of Sisal grass or Jute.

George R. Sampson. Is engaged in the Manilla trade; has imported more Manilla hemp than any other house—eighteen thousand tons for this port and New York in the year. It is usually termed as Manilla hemp, and invoiced as such. Has imported Jute and Sunn hemp for Calcutta. Manilla hemp is used for cordage, principally running rigging. Thinks it has been called Manilla hemp for ten years, and until then it was called plantain bark. Jute and Sunn hemp are inferior articles, and used for bale rope mostly. One is imported as Jute and the other as Sunn hemp. Those are their names in commerce, and Manilla hemp is the name of commerce in that article. The importation of Sunn is very small, and so is that of Jute; either very small compared with Russian or Manilla.

A. G. Brown, agent of Boston Hemp Manufacturing Company. Manufactures Russian, American, and Manilla hemps; four-fifths or three-fourths parts of Manilla into running rigging and hawsers; of the remaining quantities four-fifth parts of Russia and one-fifth of Manilla. Began manufacturing in 1827. Manilla hemp was called grass and plantain bark till within two years, and lately is sometimes so called. Manilla hemp has been tarred to tie up laths, but this is very unusual, not twice in a year. It is unfit for standing rigging. Russian hemp may be used for running rigging, but is very unfrequently so used.

Upon cross-examination: We knew of an article called Bombay hemp fifteen or twenty years ago; cannot fix the date. That the last importation he knew was in Salem, nine or ten years ago; a small quantity imported by Mr. David Pingree. That it was an entirely different article from Russian hemp. That he has seen none since. That it was manufactured into cordage, but made a very inferior article. That it was offered to him, but he refused it as a very unsuitable article. Could not state the quantity. Has known a number of importations by D. Pingree principally, and those interested with him—say a half dozen. They called it Bombay hemp. That the witness made up a small quantity and found it to be a very inferior article. Cannot recollect that it was rigged into any vessel. That he must have made it into something that would not have been trustworthy; that he shouldn't use it as trustworthy. That he saw a number of these parcels, and that they varied in quality as all hemps do. That he has not seen any made into cordage since that time. That Mr. Whittemore bought it.

Moses Day, cordage manufacturer. Carried on business twenty-five or thirty years. Hemps he used are Russian, American, and Manilla; calls them all hemp, and designates them as Russian, American, and Manilla. That there are Jute and Sunn hemp, and the Italian, very little used. Never, to his knowledge, saw any Bombay hemp, and never manufactured any to his knowledge. Jute was called Jute, and Sunn hemp Sunn hemp. Never saw cordage made of Bombay hemp until shown a piece within a year, which he was told was of Bombay hemp. That he manufactures about two-thirds Manilla. That the Russian varies in the quantity used. It has varied very much since the last tariff. It has depended upon the quantities of American hemp, and its quality. Manilla hemp for ships is principally for running rigging, tow-lines, and stream cables, and may be for fishermen's cables; Russian for all standing rigging, foot-ropes, ratlines, spun-yarns, hawsers, and block-straps, and seizings. There are exceptions where they use the American in part for the same uses. Manilla will not hold tar; sometimes fishermen order it tarred, but it is not usual. Importation of Manilla hemp has very much increased within a few years. That in orders to us the standing rigging is usually defined as the length, &c., and the running rigging in coils. The yarns come in very much cheaper. There is an export duty in Russia on hemp of 9½ per cent. above that on cordage, and that gives the an advantage of 19 per cent. over us in the cordage.

W. Montgomery. Was a ropemaker from 1818 to 1838, or 1840; used the different kinds of hemp—Russian, Manilla, and American; some Sunn, and some Bombay, not much of the latter. Does not know the proportions of the various kinds imported. Russian was that principally imported when he was in business. They did not use much Manilla then. Has used Italian hemp; it is of strong fibre. The government decided to have that, and to use nothing else for them. This was in 1832, '3; used it for all tarred rigging. Manufactured perhaps ten or twenty tons of Bombay in 1833, '4;

does not know the quantity—it might not have been over ten tons. Manufactured it into cordage, bale rope, and spunyarn; it was called Bombay hemp; the most was made into cordage. The government refused to receive rope we made, because they said that we had put some Bombay hemp into it, but there was none; it was pure Russian. Does not think that cordage of Bombay hemp is so good as of Russian. That cordage was sold in New York; when made up, it was difficult to distinguish it. That was the only hemp of that sort which witness ever used. Has seen *Suma* hemp; first about twenty years ago, but may be less; manufactured it into bale rope. Knows Manilla by name of Manilla hemp, and by no other name.

Upon cross-examination: That the establishment bought that Bombay hemp to manufacture. It was a long while in New York. Witness has since followed the business in Roxbury and Boston, but never knew Bombay hemp used there. Is a maker of machinery for rope-works, and conversant with the business.

Deposition of W. B. Cooper and deposition of   Storer, of which copies are annexed. The plaintiffs' counsel offered in evidence the report of the Secretary of the Treasury, under date of   , as evidence of the commercial use of the word hemp. The defendant's counsel objected to it as imcompetent evidence, but the court admitted it as evidence of the importations named in it, and it makes part of the case for that purpose. The plaintiffs also introduced as evidence the Shipping and Commercial Lists of September 3d, 1842; Messrs. Baring Brothers & Co.'s Circulars of Nov'r 10, 1848, April 13, 1849, March 23, 1849, November 3, 1848; the New York Price Current, Feb'y 13; McLean, Norris & Co. Price Current; Universal Newspaper, May 9, 1846.

Stephen Whittemore, jr., cordage manufacturer, of Salem. Had been in business 28 years in partnership with his father, who carried on busines, 38 or 40 years; knows various hemps—Russian, Riga, which is Russian, Manilla, Bombay, Italian, Jute, and American; manufactures chiefly Manilla, Russian, and American; Russian for standing rigging, Manilla for running rigging, and tow-lines and warps for western rivers and States; Manilla on western rivers for tow-lines and fasts, very extensively used. Had known Manilla hemp by that name for 15 years. Since then the consumption has increased very much; now, compared to Russian, in seven-eighths. Manilla is usually sold at less price; brings from eight to ten dollars, and Russian from ten to twelve. Has manufactured Bombay, Italian, and Jute; manufactured Bombay for ships' use, for standing rigging, from 1832 to 1838; manufactured perhaps about sixty tons; manufactured some in 1843, '4, when in New York. From 1832 to 1838, was employed as a manufacturer; from 1843 to 1848 was interested, but did not manufacture; was at home once or twice a month, and knew by being interested in the purchases. It was occasionally manufactured between 1838 and 1843. The first purchased was from

Daniel Abbot & Co., of Salem, in 1833; next purchased of Peters, Pond & Co., and afterwards of David Pingree; manufactured some in New York; knew that it was used for standing rigging. Between 1832 and 1838, made three gangs; presumes that Daniel Abbot was owner of one vessel; Hooper of Manchester owned the schooner. Bombay hemp takes tar and holds it well. Saw the vessels afterwards; the brig was owned by Appleton & Co. several years; did not particularly notice the rigging—supplied them, and never heard anything to the contrary, and believe it was the same. Bombay hemp retains tar better than the American and Italian, and about the same as Russian; Bombay is inferior in strength, and that is all the difference. Knows appearances of the different hemps produced; identifies Italian. 2d. This is Russian; I distinguish them by feeling of the fibre, and general appearance. 3d. Russian; 4th, Bombay; 5th, Jute; 6 and 7, Sisal; 8, Bombay, resembling Russian in fibre; 9, Bombay; 10, Bombay; 11—should call this half Russian hemp, half clear, and the other half Bombay. 12, Sunn hemp. Examines tarred ropes. 1. This is Russian hemp, manufactured here with American tar. 2. This is Bombay. I won't be positive, but it resembles it; there is more difficulty in judging of cordage than of the hemp. The fibre of Bombay is stiffer, and not so flexible as the Russian; should not want to swear without untwisting it. Looks at specimen of hemp. This feels like Riga; may be of that quality. (It was marked Riga.) Looks at another. This is Russian. (It was American.) It is difficult to tell between Russian and the American water-*rolled* hemp. Looks at cordage. This is American dew-rotted hemp; I tell by the fibre and color. The Bombay is not so clear; not so well prepared. Italian hemp is long. These articles are usually known as hemps—Manilla, Russian clear, Russian out-shot, Riga, Bombay, Italian. If he wanted any he should order the kind he wanted by name—Russian, Manilla, &c. And unless he gave a specific name, it would not be known which he wanted.

Upon cross-examination: Knows plaintiff, but not particularly; has had conversation with him about these hemps in Boston; does not know his trade; had seen these samples of hemp and rope before; saw some of them in New York; had not seen them before out of court; saw the specimens of rope some six weeks ago in possession of plaintiffs' counsel. The last time he ever manufactured Bombay hemp, was in 1844, in New York. The last he ever manufactured in Massachusetts was in 1840 to 1844; does not know precise quantity; from 6 to 10 tons for ships' purposes. Bombay hemp is not so good as Russian for working standing rigging. From 1833 to 1845, should have understood an order for standing rigging to have been Russian hemp. If he had received an order for standing rigging, and specifying the kind, he should have made it of Russian hemp. The other standing rigging was made for fishing vessels. That very little Bombay hemp is used, compared to Russian, for making cordage; no great amount has ever been used in this section of the country. Thinks it has been mixed. From 1833 to 1838, manufactured from 300 to 400 tons per year. Russian hemp is used for cables, standing rigging, ratlines, and seizings, for American hemps. Bolt rope is usually imported; was made solely from Russian before introduction of American hemp. American hemp became common in 1835. Manilla hemp used to be called Manilla grass. His purchase was of Peters & Pond, in 1833, about five tons; thinks more was bought of Abbott & Co. in 1833; does not know how much; several tons. That bought of Pingree was in 1840, about 10 tons. Russia hemp is distinguishable, because it is cleaner and stronger. Bombay hemp is not *not* so well cured; fibre averages somewhat shorter; somewhat from the smell. There is a dirt from the Bombay. The parts of the plants give the smell; not a foreign substance introduced. Means that the smell may be, because one is not so well washed as the other. Bale rope has been the principal use for which Bombay hemp has been used, and ropes for Western market. Has seen the tow of Russia hemp used to make bale rope. Cordilla is tow from the root end of Russia hemp. Has mixed Bombay with Russian; would not swear whether he informed the purchaser or not; was not the salesman, but the manufacturer, and manufactured to the order of his employer; was merely foreman, or superintendent. A mixture would not be equally good.

Re-examined: Russian hemp may be applied to all the uses which are made of hemp. Bombay hemp, at South and North, is generally used for bale rope, and a cheap kind of rope. Manilla hemp has been known by that name for 12 or 15 years. Bombay is not so well prepared, and in consequence decays.

Montgomery called again: Produces specimens of Bombay hemp. This was given to me by Mr. Taylor to have it hackled; I knew it to be Bombay hemp, and hackled it.

Cross-examined: I knew it to be Bombay hemp, from the appearance; from the fibre and smell. The difference in fibre is, that it is rather harsher than the Russian. The hackling does not prevent the odor; it takes out part of the dust, so that the odor is not so strong. The counsel for the defendant offered in evidence Webster's Dictionary, upon the meaning of the word "like," used in the treaty; also the lexicographical meaning of the word "meme" in French; and also the same dictionary as to definition of word "hemp;" also the Encyclopedia Botanica, upon the subject of hemp. To this objection was made by plaintiff's counsel, on the ground that the question was one of the commercial use of the word hemp, and not the botanical or scientific, or physiological use.

The defendant's counsel cited 9 Wh., 435, note. Plaintiffs' counsel cited . The court, after discussion, ruled that the botanical difference is not material; and that it was also immaterial to them that the article called Bombay hemp could not be grown in Russia, and ruled out all evidence upon the botanical origin and nature of the plants called Russian and Bombay hemp, and upon the scientific classification and characters of them, until it should appear that their practical uses and characters were so uncertain as to require recourse to this species of evidence. The defendant's counsel then introduced the following evidence:

The deposition of Dr. Boyle, of which a copy makes part of the case. The 2d interrogatory and answer were objected to by plaintiff's counsel, on the ground that persons in England cannot be permitted to testify to the commercial use of language in this country. Ruled out. The 3d were also objected to, but admitted by the court, omitting the botanical names.

The deposition of John Weeks, of Liverpool, hemp broker, a copy of which makes part of the case. The 6th interrogatory and answer were excepted to by counsel of plaintiffs, but ruled in.

Josiah Bradlee, of Boston, merchant, who testified that he was well acquainted with the article of hemp; that the produce of Russia and of the United States is in commerce termed as hemp, and that no other is so known, according to his knowledge; and that he has very rarely seen any article similar. Did not know that he ever saw Bombay hemp, and had done a vast business with Russia and elsewhere as a commission merchant. Upon cross-examination, he testified that his business had been with various foreign ports in Europe, and some with Canton and Calcutta; that he never bought Italian or Hungarian hemp; never bought or sold any but Russian. In answer to question from the court, he stated that Russian hemp had been at two hundred dollars per ton for the past five years; and that Manilla has varied from eight to ten cts. per pound, and would not average ten cents; that he had sold a large quantity of Manilla hemp *with* the past ten years. And to question by plaintiffs' counsel, that Manilla hemp cannot be used for the purposes for which Russia hemp is, as it will not take tar; that he never saw any tarred, or that had been so.

James Ingersoll, of Boston, merchant, engaged in the Russian, Havana, and India trade, testified, that commercially, for the last ten years, the word hemp means Russia, Riga, St. Petersburg, Manilla, Sisal, Jute, a very inferior article, and Sunn; that he did not know of Bombay hemp; that the greatest quantity imported was Russian and Manilia; that Manilla is used for all purposes, except cables, standing rigging, stays, bolt ropes, &c.; that Russian was used for running rigging before Manilla, and may be used now; that we imported from Manilla 6 or 7,000 bales; 50,000 bales in four or five years; that Manilla is one of the Philippine islands, and the hemp is made from the white plantain tree, as he was informed. Upon cross-examination, he testified that it was invoiced as hemp; that he never received but one invoice from Manilla, and it was therein called hemp, and this was four or five years ago; that within twelve months he had sold it at twelve cents; and he had bought it as low as five and three-fourths cents per pound, and that the average is nine and a half and nine cents; that the average of Russia hemp was not far from two hundred dollars and two hundred and ten dollars per ton, and had sold it within four years at three hundred and two hundred and thirty dollars; had averaged for the last two years, two hundred and twenty dollars.

Samuel J. Bridge, appraiser in the custom-house in Boston for the past nine years, testified, that the descriptions of hemp imported during that time were three kinds—Russian, Manilla, as grass bark, and as hemp, and a very limited amount of Italian hemp, and one single importation of Bombay, which is the one in question in this suit. That grasses, Sisal, and jute, are imported; that the price of India hemp is litle more than half that of Russian here, one having to be transported 15,000 miles, and the other 2,000 or 3,000; that all the hemps of India are, in value, very much below the Russian; that the consumption of Manilla hemp is prodigious, it being made into all sorts of lines, mats, and petticoats, called grass-cloth, and into paper and all sorts of lines and cords. That jute is used to make gunny-cloth and bale rope. That Sisal would be applied much like Manilla, and is always imported as Sisal grass, and that it comes from Yucatan.

Upon cross-examination, he testified that a specimen was entered as grass-cloth, and is now entered as hemp-cloth, and that something was refused on that account.

Upon re-examination by plaintiffs' counsel, he stated that Manilla hemp is still imported as plantain bark; that some call it Manilla hemp, and in 1849 was called Manilla grass; that it is imported generally now as Manilla hemp, and that this is its usual name in the market now; but that, in the records of the custom-house it is called by one name as much as by the o her. That Russian hemp is worked into sheeting and bagging.

Benjamin Sewall, of the firm of Sewall & Day, manufacturers of cordage in Boston, testified that he had been engaged in this business fifteen years; that they used Russian, American hemp, and what is called Manilla, and in a few instances have manufactured some Sisal grass and jute, but very seldom, and not in very large quantities; had also had a few bales of sunn; that commercially Russian and American are the only articles known under the name of hemp; that Manilla has for several years been called hemp; that he never saw any Bombay hemp until he saw the sample exhibited yesterday, and was called upon by Mr. Mansfied; that Manilla hemp is not used for all the purposes of Russian, and certainly cannot be; that a few trials have been made; that Manilla is for running rigging, clothes-lines, bed-cords, and general country use, mats; that the greatest portion of Russian is used for vessels' standing rigging, cables, &c.; that one is better for one purpose, and the other for another; that Russian hemp cannot be used untarred, but Manilla can be, and is therefore better for running rigging.

Upon cross-examination, he testified that Manilla hemp is bought and sold by that name; that it is an arbitrary name; that they had bought very little Italian hemp; that it does take tar, but not so well as the Russian; that they had tried the experiment of tarring Manilla; that the average price of Manilla was six and quarter to six and half cents per pound; that it is a speculative article, and has been twelve cents two years ago, and thought they had sold thirty bales at thirteen cents per pound; that he had bought Russian for one hundred and seventy-five to two hundred dollars, and had sold it for three hundred dollars, and that the high price of the Manilla was owing to a great scarcity; it is a speculative article.

Mr. Day called again. Testified that he was a partner of the last witness, and had been engaged in this business thirty-five years; that he knew nothing about Bombay hemp; had the impression that he saw a small quantity about fifteen years ago, but only one, and does not know that it was, but that was his impression; and from seeing the sample here yesterday, thought that it must have been one.

W. H. Foster, merchant, of Boston, in the Calcutta business: Has resided in India, and has some knowledge of the various articles used for hemp, and never heard of Bombay hemp until he came into this court. His first visit to Calcutta was twenty-one years ago, and was going back and forth until the year 1843, and then resided there nearly three years as a commission merchant, furnishing all kinds of produce, and has been ever since almost exclusively engaged in the India trade; that he never heard of the article, Bombay hemp, there, and never saw it until he saw the sample here; that if he had ever seen it there he should have endeavored to take advantage of it; that he had inspected all (articles) that are imported there of any consequence; that he never imported these substitutes for hemp, but had bought them out there for other persons.

Upon cross-examination, he testified that he resided at Calcutta, perhaps   miles from Bombay; that there is considerable trade between Bombay and Calcutta; that he had purchased jute, and had seen Sunn hemp in Calcutta, and it was so called there; that freight from Bombay and back per ton weight was   ; that there is very little freight from Bombay to this country, and should suppose it to be about fourteen dollars per ton. There would be no difference as to freight from Bombay and Calcutta; that there is a good deal of trade between Bombay and Salem, and more in New York than in Boston.

Samuel Eveleth, appraiser of customs in Boston, testified that he had seen India hemp imported from Calcutta, but knew nothing of Bombay hemp under that name from Bombay. That he, as appraiser, passed this parcel which came from Liverpool, and took out the sample identified. That he had seen a similar article before from India, and knew what it was called, and generally termed as invoiced. He heard it called hemp before he saw it in the invoice. Did not recollect the time; it was some that had been brought from Calcutta. He should not think that it had come more than three or four times, and thought it was imported as hemp, but does not know positively. That he made a report on the entry, and thinks it was called hemp.

Josiah Dunham, ropemaker, Boston: Has followed the business thirty-five years. Of the hemps he has used were jute, sunn, Russian clear, outshot, half clear, American dressed, America, Manilla, and once some Bombay, St. Domingo, and Sisal like Manilla; and that they designated it by the name of the place from whence it came. The Bombay he used, as near as he could recollect, was between 1829 to 1834, 1835, as much as 15 years ago. It was a considerable quantity, bought of Mackay and Cooledge; could not tell what he worked it into, but thinks chiefly into common bed-cord, common cheap bed-cord. That, lately, they have not worked in tarred cordage. That he had only seen one lot of Bombay hemp since, and that was a piece which Mr. Bridge (the witness) showed to him about a week or ten days ago. That Russian hemp was used chiefly for tarred cordage, until yarns were imported—half clear, not first-rate. That since American hemp has been introduced, a good deal of cordage is made of that, standing rigging, &c. That Manilla hemp is used chiefly for running rigging and land purposes. That jute was used for mats, and bed-cords, and rope for the New York market, as cheap untarred small rope. Has seen jute mixed with other hemp to make bale rope. That they do not pretend to use good hemp for bale rope; it cannot be afforded. That jute is weak enough at any rate, and exposure to air makes it tender. That it is generally worked in when they have to take a very low price—in inferior made bed cordage. Upon cross-examination, he testified that he did not know that they had ever made bed-cords of Russian hemp, but had used the tow for that purpose; that outshot and half clear work into cordage; that he had formerly worked the half clear. The yarns are tarred to prevent weather operating on the yarn; they do not lay that up into rope.

Mr. Sewall produced a written statement, again put into the case. They charge in 1848, was wrong to the yarns coming in so much cheaper than hemp, that we could use it instead of American hemp. It was only the American hemp that competed with the Russian for the purposes for which the Russian was used. The American was put to tarred cordage.

Whittemore, again called by plaintiffs, testified that Manilla hemp will take tar; that he had tarred it for cutter yarns and hawsers; that it took all they wanted it to take, and would probably take and hold tar as well as the Italian; that it would not retain it as well as the Russian, but would about the same as the Italian; and it is worth the American sun-rotted hemp. Upon cross-examination, he testified that the Manilla is subject to greater contraction than the Russian, but that was no reason for its not holding tar so well. That tar will sweat out when manufactured and in wear. That there is a very obvious difference between this (Bombay) and Russian. That he had seen, perhaps, from fifty to one hundred tons of Bombay hemp during the last fifteen years in Salem and New York, used for and ships' hawsers; larger portion for hawsers. That cordage and cable can take tar equally well. That large rope does cause the tar to sweat out; and that cable lines are not laid.

Benjamin Sewall, again called by defendant, testified, that as to tarring Manilla hemp, they had manufactured Manilla hawsers, and perhaps a few coils of tarred cordage; that it is not best, generally, to set it out—it makes it stiff; that the object of tarring lathe lines is to keep the fibres together when they are less twisted.

Day, called again by the defendant, testified that they could put almost any quantity of tar *the* pleased into fibrous material. In tarring lathe yarns they have put in 22 per cent. into Manilla hemp; but, in tarring for America or Russia cordage, they put in 45 per cent.; and it would take almost any quantity, but he did not know that Manilla would take more; that in lathe yarns there is no test; they are merely tarred more. In cables it is never put upon the dead strain that shrouds are, and hence, if little tar comes out it is not minded. That they usually put in from 10 to 15 per cent. in Manilla cables, and in Russian and American 24 or 25 per cent., depending a little upon the weather.

Upon cross-examination, he testified that he thought it would come out of Manilla if more were put in. That Manilla hemp has a round fibre, and will not hold so much as American and Russian. That they use tar with Manilla hemp when called upon to do it, which is not oftener than once in fifty times; that three-quarters of the hawsers are made without tar.

The evidence being all in on both sides, it was agreed that the case should be taken from the jury and submitted to the court, with authority to draw all such inferences of fact as a jury would be authorized to draw from the evidence, and that a verdict should be entered, and judgment should be rendered for the plaintiffs or the defendant, as the court should think proper, upon the law and the evidence.

R. CHOATE & BELL,
For Plaintiffs.

B. F. HALLETT,
For Def't, U. S. Attorney.

The question raised at the trial, and the rulings of the court thereupon, were made part of the case to be passed by the court.

C. G. LORING,
For Def't.
R. CHOATE & BELL,
For Plaintiffs.

The depositions of Wm. B. Cooper and Albert Storer, annexed, are as follows:

UNITED STATES OF AMERICA.

The Circuit Court of the United States, within and for the Massachusetts district.

MASSACHUSETTS DISTRICT, *ss.*

[SEAL.]

To T. G. Talcott, of the city of New York, esquire:

Know ye, that reposing confidence in your wisdom, prudence, and fidelity, we have appointed, and by these presents do authorize and empower you to take the answers [to the interrogatories hereunto annexed] of William B. Cooper, Albert Storer and John Thursby, all of New York, in the district of New York, witnesses to be examined on behalf of the plaintiffs, and to be used in a certain cause now pending in said court, wherein Charles G. Taylor et al. are plaintiffs, versus Marcus Morton, defendant; and to this end, at certain days to be by you appointed for that purpose, to cause said witnesses, as aforesaid, to be brought before you, and each witness, while present before you, to examine carefully on oath touching the premises. And when you shall have taken the examination as aforesaid, to reduce or cause the same to be reduced to writing, and to be subscribed by each of said witnesses in your presence; and the same, so taken and subscribed, to return, together with this commission and your doings herein, enclosed, sealed and directed to the circuit court aforesaid, now holden at Boston, as soon as the same shall have been executed; the depositions to be taken on paper corresponding in size with this commission.

In testimony whereof, we have caused the seal of the said circuit court to be hereunto affixed.

Witness the Honorable Roger B. Taney, at Boston, this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and forty-eight.

JAS. B. ROBB, *Clerk.*

N. B.—You shall not, except by consent of the parties in writing, permit either party to attend at the taking of the depositions, either himself or by any attorney or agent, nor to communicate by interrogatories or suggestions with the deponents whilst giving their depositions in answer to the interrogatories annexed to this commission. And you shall take such depositions in a place separate and apart from all other persons, and permit no person to be present during such examination, except the deponents and yourself, and such disinterested person (if any) as you may think fit to appoint as a clerk, to assist you in reducing the depositions to writing. And you shall put the several interrogatories and cross-interrogatories to the deponents in their order, and take the answer of the deponents to each, fully and clearly. Depositions to be taken on paper of like size with this commission.

The execution of this commission appears in certain schedules hereto annexed.

THOMS. G. TALCOTT,
Commissioner.

Circuit Court of the United States for the first circuit, Massachusetts district.

TAYLOR et als.
vs.
MORTON.

Interrogatories to be addressed on behalf of the plaintiffs to William B. Cooper, Albert Storer, and John Thursby, all of New York, in the district of New York.

No. 1. What is your age, occupation, and place of residence?

No. 2. How long have you been engaged in your present occupation?

No. 3. Do you, or not, know the various kinds of hemp used in commerce and imported into this country; if aye, do you, or not, know an article called Bombay hemp? Have you, or not, ever imported or brought, or sold the same, and for what purposes? Please to state fully.

No. 4. Have you, or not, manufactured any of such hemp, and for what purposes; have you, or not, manufactured Russia hemp for bale rope; of what length is the fibre of Bombay hemp?

No. 5. Do you, or not, know of Bombay hemp being manufactured into tarred rigging for ships; and is, or is not, such hemp, if properly hackled, fit for ships' rigging; do you, or not, know of its being used for that purpose; does it, or not, take tar?

FLETCHER WEBSTER,
Att'y for Pl'ffs.

Depositions of witnesses produced, sworn and examined on the fifteenth, eighteenth, nineteenth, and twenty-fifth days of April, in the year of our Lord one thousand eight hundred and forty-eight, at the city of New York, in the State of New York, under and by virtue of a commission issued out of the circuit court of the United States, within and for the Massachusetts district, in a certain cause now pending in said court, wherein Charles G. Taylor and others are plaintiffs against Marcus Morton, defendant.

William B. Cooper, being duly sworn and examined, on the part of the plaintiffs, pursuant to the direction in the commission hereto annexed, doth depose and say as follows, viz:

First. To the first interrogatory he saith, that he is forty-four years of age; that his occupation is that of a merchant, dealing in hemp and cordage, and manufacturing the same; and that his residence is in the city of Brooklyn, in the State of New York.

Second. To the second interrogatory he saith, that he has been engaged in his present occupation for a period of more than twenty years.

Third. To the third interrogatory he saith, that he knows the various kinds of hemp used in commerce and imported into this country; that he knows the article called Bombay hemp, which resembles Russian hemp in appearance; that he has bought and sold, and thinks he has imported the same; that he has manufactured it principally into bale rope, and has both bought and sold it for such purposes.

Fourth. To the fourth interrogatory he saith, as before in his answer to the third interrogatory, that he has manufactured Bombay hemp chiefly into bale rope, but has had tarred cordage made of Bombay hemp returned to him in place of Russian hemp delivered to be manufactured into that article. When the Bombay is carefully hackled it is difficult to distinguish it, in the form of tarred cordage, from the Russian; that the fibre of Bombay is about the same as that of Russian hemp as to length, varying in length as does the fibre of Russian hemp.

Fifth. To the fifth interrogatory he saith, that he has known Bombay hemp to be manufactured into tarred rigging for ships; that the best qualities of Bombay are fit for such purpose, but are not so good as Russian hemp, not being so strong; that when used for such purpose it is generally mixed with Russian; that he believes it has been frequently used for ships' rigging in whole or in part, but usually, in such cases, has been mixed with Russian; that he has seen it manufactured into tarred rigging, and could not distinguish it from Russian; this was of good quality, and well hackled. It does take tar.

WM. B. COOPER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 15th day of April, 1848, before

THOMAS G. TALCOTT,
Commissioner.

William B. Cooper, the above named witness, being further duly sworn, and examined on the part of the plaintiffs, pursuant to the directions contained in the commission hereto annexed, deposes and says, in addition to, and in explanation of, the answers heretofore by him given, as follows:

First. To the first interrogatory he saith, that his place of business is No. 70 South street, in the city of New York.

Second. To the fourth interrogatory he saith, that he has manufactured Russia hemp into bale rope.

WM. B. COOPER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 18th day of April, 1848, before

THOS. G. TALCOTT,
Commissioner.

Albert Storer, being duly sworn and examined on the part of the plaintiff, pursuant to the directions in the commission hereto annexed, doth depose and say, as follows, viz:

First. To the first interrogatory he saith, that he is thirty-three years of age; a ship chandler by occupation; that his residence is in Brooklyn, Long Island, and his place of business is at No. 53 South street, New York city.

Second. To the second interrogatory he saith, that he has been engaged in his present occupation about five years.

Third. To the third interrogatory he saith, that he does know the various kinds of hemp used in commerce, and imported into this country; he knows the article called Bombay hemp, but has not seen much of it; he has bought on one occasion of Tucker, Cooper & Co., of New York, six or eight bales of Bombay, for the purpose of having it made into tarred cordage, as an experiment; this was about eighteen months or two years since; that he has never imported this article, but sold a few bales of the lot bought of Tucker, Cooper & Co., above named, and has never bought or sold any other lot.

Fourth. To the fourth interrogatory he saith, he has never manufactured Bombay himself, but that the bales so bought of Tucker, Cooper & Co., as mentioned in the preceding interrogatory, were manufactured by John Thursby, of New York, into tarred cordage by his directions; has never manufactured Russian hemp into bale rope or had it so manufactured; that he does not know the length of the fibre of the Bombay hemp.

Fifth. To the fifth interrogatory he saith, that he has heard of Bombay hemp being manufactured into tarred rigging for ships, but cannot specify the ship or person from whom he had the information; that such hemp as Bombay, if properly hackled, would not make so good a rigging as Russia; that he cannot say whether that hemp, if properly hackled, would or would not be fit for ships' rigging; that he has heard of one ship, belonging to Boston or to some port near Boston, being fitted out with rigging of Bombay hemp, but does not remember the name of the ship. But Bombay hemp does take tar.

ALBERT STORER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 19th day of April, 1848.

THOS. G. TALCOTT,
Commissioner.

The case was thence continued from term to term to this present term, when, on motion of the attorneys for the plaintiffs, the ad damnum of the writ is, by leave of court, amended by inserting the sum of two thousand five hundred dollars in the place of "two thousand dollars;" and issue having been joined, as above stated, and fully argued by counsel, and the court having fully considered the same and the evidence relating thereto, the case is submitted, under instructions from the court, to a jury duly sworn to try the same, who thereupon return their verdict, in conformity therewith, as follows:

"The jury find that the defendant did not promise in manner and form as the plaintiffs have declared against him."

It is thereupon considered by the court, that the said Morton do recover of the said Charles G. Taylor and Henry A. Taylor his costs of suit, taxed at the sum of two hundred and ninety-four dollars and five cents.

Attest: H. W. FULLER, *Clerk.*

UNITED STATES OF AMERICA,
Massachusetts District, ss.

I, Henry W. Fuller, clerk of the circuit court of the United States for the first circuit, Massachusetts district, do hereby certify that the foregoing is a true copy of the record, and of all proceedings, in the cause of Charles G. Taylor and Henry A. Taylor vs. Marcus Morton, in this court.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Boston, in said district, [SEAL.] this twentieth day of September, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-fourth.

H. W. FULLER, *Clerk.*

Bond.

C. G. & H. A. Taylor }
vs. } In Error.
Marcus Morton. }

Know all men by these presents, that we, Charles G. Taylor and Henry A. Taylor, of the city of New York, and State of New York, and Frederick Almy and Nathan Hobart, of Boston, in the Commonwealth of Massachusetts, are held and firmly bound unto the above named Marcus Morton, in the sum of two hundred dollars, to be paid to the said Marcus Morton, his executors and administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this third day of November, in the year eighteen hundred and fifty-eight.

Whereas the above named Charles G. and Henry A. Taylor have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered, in the above entitled suit, by the circuit court of the United States for the first circuit and district of Massachusetts, at the October term for the year eighteen hundred and fifty-five:

Now, therefore, the condition of this obligation is such, that if the above named C. G. and H. A. Taylor shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise remain in full force and virtue.

CHARLES G. TAYLOR, [SEAL.]
HENRY A. TAYLOR, [SEAL.]
FRED'K ALMY, [SEAL.]
NATHAN HOBART. [SEAL.]

Sealed and delivered in presence of—
Geo. Lewis,
N. Burr Smith,
For C. G. and H. A. Taylor.
Louis Arnold,
E. C. Prescott,
For F. Almy and N. Hobart.

Approved 3d December, 1858.

P. SPRAGUE,
Judge of Dist. Court.

A true copy.
Attest: H. W. FULLER, *Clerk.*

Filed 15th October, 1859.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1860.

No. 81.—CHARLES G. TAYLOR & ALS., PLAINTIFFS IN ERROR,

vs.

MARCUS MORTON.

Brief for Plaintiffs in Error.

◆

No. 284.—ERNEST FIEDLER, DEFENDANT IN ERROR,

adsm.

MARY CURTIS, ADMINISTRATRIX OF EDWARD CURTIS.

Brief for Defendants in Error.

R. H. GILLET,
C. CUSHING,
Of Counsel.

G. S. GIDEON, Printer, 511 Ninth street, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

Charles G. Taylor and Another, Pl'ffs in Error, vs. Marcus Morton, late Collector.	No. 81, for December Term, 1860.

Brief for Plaintiffs in Error.

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF MASSACHUSETTS.

This was an action of assumpsit, brought against the late collector of the port of Boston, to recover an excess of duties demanded and received on unmanufactured hemp, imported by them in 1846, from Russia. The defendant demanded duties at the rate of forty dollars per ton, and this suit was brought to recover back all beyond twenty-five dollars per ton.

The questions involved are the same, with one exception noted, as in the following case:

SUPREME COURT OF THE UNITED STATES.

Ernest Fiedler, Defendant in Error, adsm. Mary Curtis, administratrix of Edward Curtis, deceased.	No. 284, December Term, 1860.

Brief for the Defendant in Error.

ERROR TO THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This is an action brought against Edward Curtis, as late collector of the customs at the port of New York, to recover an excess of duties paid upon certain importations of unmanufactured hemp imported from St. Petersburg, in Russia.

Between the trial and judgment Edward Curtis died, and his administratrix was made a party in his place; and, on judgment being rendered against her, she removed the cause to this court by writ of error.

On the trial, it was admitted that the plaintiff below, on the 1st of September, 1842, imported in New York, from Russia, a quantity of unmanufactured hemp, on which the defendant exacted, and the plaintiff paid, duties at the rate of forty dollars per ton, amounting to $2,575 38, which was paid under protest in writing. R., p. 9.

It was further admitted, that if at the time of said importation said hemp was only chargeable with a duty of twenty-five dollars per ton, then the said collector had exacted an excess of duty amounting to $965 77. R., p. 10.

It was also admitted "that all the hemps of India are the products, not of the *cannabis sativa*, the ordinary hemp plants of Russia and the United States, but of other and different plants and trees." R., p. 13.

Under the instructions given by the presiding Judge (Nelson), the jury founded a verdict in favor of the plaintiff, for the excess of duty over twenty-five per cent., with interest.

The counsel for the defendant requested the judge to instruct the jury in conformity with particular instructions prayed by him; which he refused to do, but gave certain other instructions. To the refusal to instruct as requested, and to the instructions actually given, the counsel for the defendant then and there excepted; and the presiding judge signed and sealed exceptions. The correctness of the decision of the court is to be now tested on the writ of error in this case.

POINTS.

FIRST. *That the act of March 3d, 1839, requiring collectors receiving money under protest, to pay the same into the Treasury, does not bar the right of recovery in this case.*

On the trial, the defendant requested the court to charge that the action could not be maintained, "inasmuch as, by the second section of the general appropriation act of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required, and did pay such moneys into the treasury of the United States, and that the act of Congress of the 26th of February, 1845, cannot operate, nor should it be construed to operate, retrospectively, to subject said defendant, in his individual capacity, to such action." The judge refused to give this instruction, and the defendant excepted. R., p. 14.

This presents the question, whether the act of 1839 deprived the plaintiff of his right of action, and continued to do so.

The provision referred to is as follows: (5 U. S. L. 348, §2.)

"That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest, against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the said Treasurer, kept and disposed of; and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties, or *the result of any litigation* in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the treasury not otherwise appropriated."

At the January term of the supreme court, the case of *Cary* vs. *Curtis* (3 H., 236) was decided, in which it was held that the above provision protected the collectors from prosecution in cases where they had exacted an excess of duties, and paid the same into the treasury. Congress being then in session, the act of February 26, 1845, (5 U. S. L., 727,) was passed to remove the obstacle in the way of recovering in such cases, where the importer had been wronged. The act provided: "that nothing contained in the second section of the act of 1839 shall take away, or be construed to take away, or impair, the right of any person or persons who *have paid* or *shall hereafter pay* money, as and for duties under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized, or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law; nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

Although the act of 1839 was held to prevent a recovery, the above act of 1845 removed the obstacle, and was designed to permit suits for previous exactions. Had not this been so, those previously paying excess of duties would have been remediless, because this act of 1845 prohibits refunding by the Secretary under the act of 1839. The object of the act was not to deprive the party of a remedy, but to confer one in entire harmony with the provision of the Constitution in relation to jury trials. Although at the time of this transaction the plaintiff was prohibited from suing, the prohibition was removed, and it became lawful in 1845.

SECOND. *The protest served was sufficient in form, and the collector was bound to take notice of the law protecting the rights of the importer, without its being specified in the protest.*

On the trial the defendant's counsel requested the court to charge, "that the present action could not be maintained, because the protest of the plaintiff, dated September 1, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question; nor did it discriminate between the duties so charged on such hemp, and the duties charged on the order included in the entry, to which said protest was attached; but, on the contrary, the said protest referred to the duties charged in the said entry—those charged on the iron, equally with those charged on the hemp—placed the objection to the payment thereof on the ground that there was no law authorizing their exaction." The judge refused to give this instruction, and exception was taken. R., p. 14.

At the time of paying the excess of duties now claimed, the plaintiff made a protest in writing, broad enough to cover his case, which was endorsed on the entry in these words: "I hereby protest against the payment of the duty charged in this entry, on account that there exists no law authorizing the exaction of said duty." R., p. 7.

The defendant now seeks to escape liability, upon the ground that the duties on the iron, and a portion of those charged on the hemp, were authorized by law. His theory is, that the whole does not include a part. Until he demonstrates this, the common axiom must be respected which establishes the opposite conclusion. The protest, although broad enough to cover the duty on the iron, the plaintiff did not seek to apply to that article. To that extent there is no fact proved in the case to which it is applicable.

But as to the hemp on which the defendant charged forty per cent., the protest does apply. The plaintiff claimed that there was no law authorizing that duty. If he was bound to specify the objection, he did so most fully.

But prior to 1845, there was no law requiring the protest to be in writing, or to specify the objections. The necessity of written protests and specific objections led to the provision in the act of that date, (5 U. S. L., 727,) which provides:

"Nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of the said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

This was the first law which required the protest to be in writing, and to specify the particular objection to the payment required.

But this act cannot be construed to have a retroactive effect, so as to deprive a claimant of a lawful right existing at the time of its passage. The right of the claimant became fixed before the act passed, and he was legally entitled to have his money refunded.

The act of 1839 was the only obstacle in the way of recovery, and that was removed. To hold that the act of 1845 required a protest in writing, and of a special character, which was not requisite when the excess of duties was demanded, and could not then be supplied, while it repelled the power of the Secretary of the Treasury to give relief, would be to declare that the claimant was deprived of all possible remedy, when the avowed object of the act was to confer one of a popular character. Congress had no power thus to devote private property to public use, and deprive the party of all possible means of indemnity. Such was not the intention of Congress, and no such construction can be put upon the act.

But even under this provision of the act of 1845, the protest was sufficient. It was made in writing and at the time of paying the duties. It states that there was no law authorizing the collector to demand duties at the rate upon which he insisted—that is, forty dollars per ton. The question was upon that high rate. The collector demanded it, and the importer objected to paying it. The act of 1845 did not require the importer to state how much he thought the law authorized the collector to demand. He resisted the exaction of forty dollars per ton, and the collector insisted upon it, and that was the matter in dispute, and the protest was prepared to meet it.

There was no question of fact involved, to which the importer was bound to call the collector's attention, so that he might examine it and determine it. The question was one of law—to wit, what was the lawful duty upon the hemps of India? The collector was bound to know the law, whether found in the Constitution, a treaty, or statute. He did not need to have his attention specially called to the law. He decided it by declaring, as a matter of law, that the hemps of India were not hemps under the law, and therefore, that the hemps of Russia were not entitled to admission at the rates established for hemps of India; or, he may have decided that the act of Congress repealed or nullified the provision of the treaty. In either event, the protest was sufficient. The objection is too technical to be permitted to deprive the party of a legal right which has been conceded others where no such formalities as a protest are shown.

If the protest required by the act of 1845 includes and extends to those previously made, it is confidently insisted that the one in question was sufficient.

THIRD. *The hemp upon which the duty of twenty-five dollars per ton was imposed by the tariff of* 1842, *was the hemp of commerce.*

On the trial it was submitted to the jury to determine, as a question of fact, whether, at the time of the passage of the act of 1842, the hemps of India specified therein were generally known as hemps in trade and commerce. The jury found from the evidence that they were so known. This is the legal effect of the verdict.

The question was raised, whether the statute referred to the hemps of commerce or those of botany.

The words of the act (5 U. S. L., 550) are as follows:

"Third. On unmanufactured hemp forty dollars per ton; on manila, sunn and other *hemps* of India; on jute, sisal grass, coir, and other vegetable substances not enumerated, used for cordage, twenty-five dollars per ton."

The defendant requested the court to charge: "That upon the true construction of the tariff act of the 30th of August, 1842, all hemps, wherever produced, and even though produced in India, which are the product of the cannabis sativa, are charged with a duty of forty dollars per ton, and the lesser duty of twenty-five dollars per ton is limited to hemps, not the products of the cannabis sativa, but of other and different plants, or trees, and therefore the discrimination made in favor of such hemps of India was not an infraction of the treaty with Russia of December, 1832." R., pp. 14, 15.

The court refused to give this charge, and the defendant excepted.

It is claimed by the defendant, that "manila, sunn, and other hemps of India," are not hemps within the meaning of the law, and therefore that no hemp was charged with a duty of less than forty per cent. This position is assumed upon the ground that botanists, in their classifications, have conferred upon one fibrous plant of the nettle family the name of cannabis sativa, and upon others whose products are applied to the same use, other botanical names have been conferred. The tariff was made with reference to commerce and revenue, and not with reference to botanical classifications. To seek to execute the tariff laws with reference to botanical considerations, would lead to inextricable confusion. Cannabis savita forms a portion of order of "Urticaceæ," which con-constitute "the nettle and hemp order—trees, shrubs, or herbs with watery juice and alternate and stipulate leaves, often covered with asperities or stinging hairs." Merchants cannot be expected to go into the minute details under such general heads to hunt out a single variety honored with a Latin name, meaning hemp that is planted. The hemp that is planted in some countries is a native of the East Indies, where the precise same article grows without cultivation as well as with, and is cultivated sometimes on account of its fibre, and of others on account of its narcotic or intoxicating powers. (Encyclopœdia Britannica, vol. 11, title Hemp, p. 311; vol. 5, title Botany, Nat. Ord. 199, p. 206.) By no reasonable diligence can a merchant, or a collector of customs, understand and pass upon these botanical distinctions. A learned professor, skilled in botany, might find it difficult to distinguish the cultivated from the uncultivated hemp, especially when he could have before him only the fibres and not the stalk from whence it was produced. A merchant could not possibly understand the difference between the various kinds, nor could he rely upon representations of vendors when the article failed by its appearance to furnish the evidence from which to form a correct judgment. In such cases the most honest merchant, seeking to do right, might be subject to great perils, and the collector liable to fall into error. But both merchant and collector are supposed to know the classification of articles of commerce. The merchant knows what he buys and sells as hemp. The collector must also know what is thus bought and sold, and he will find the articles and their prices in market, in various countries, in the prices current of the newspapers and in mercantile circulars.

The act itself specifies "manila, sunn, and other *hemps* of India." It then refers to "jute, sisal grass, coir, and other vegetable substances" used for cordage. If Congress had not thought that manila and sunn were hemps, they would not have described them as such, but would have classed them with the other vegetable substances used for cordage. Instead of including them with vegetable substances of which cordage can be made, in one class, they make two classes. The first is composed of manila and sunn and *other hemps* of India. These two varieties are classed as hemps. The second class includes jute, sisal grass, coir, and other vegetable substances used to make cordage.

The intention of the statute is plain. It is to make India hemps pay a duty of twenty-five per cent., while hemp from all other countries was required to pay one of forty per cent. This distinction rests upon principles of sound public policy. European hemp commanded a higher price in market than those from India, and may well have been charged with a heavier duty. A heavy charge upon India hemp would have been injurious to our exportation and shipping interests, and would have limited us to a few markets instead of inviting the importations from the markets of the world.

If we treat all articles as hemp which are bought and sold as hemp, the question is relieved of all difficulty. Books within reach of the merchant show that one of the articles of exportation from Manila is "hemp." (14 Encyclopœdia Britannica, title Manila, p. 265. Lippincott's Gazetteer, p. 1135.) He hears manila, sunn, and other hemps of India, called hemp. When he sends to the Indies for hemp, he receives one of these articles. He sells the same to the manufacturer by the name of hemp. He knows the production by name, its appearance and use, whether it comes from India or Russia; but probably not one merchant in a thousand knows the botanical name of either kind. He contents himself with knowing the commercial name, and acts accordingly.

If the "hemps of India" are hemps, and they are charged with a duty of twenty-five dollars per ton, then they were charged fifteen dollars less per ton than was paid in the present case by the plaintiff. The judgment in this case determined that this was an excess of duty, and not properly demandable, but ought to be restored. The court below held that the hemp of commerce was the article on which the duty should be assessed. We think we have demonstrated that it determined the question properly, and therefore the judgment should be sustained.

FOURTH. *By the treaty of* 1832 *with Russia, hemps from that country could not be charged with a higher duty than those from India.*

We have shown that the hemp of India is truly hemp within the commercial meaning, and within the intention of the tariff law of 1842. The court below was requested to charge as follows: (R., p. 14.)

"That the present action cannot be maintained against the defendant, inasmuch as he acted in precise conformity to the tariff act of August 30, 1842, by which a duty was laid on all unmanufactured hemps (except hemps of India) of forty dollars per ton; that, as between the defendant as collector, and the plaintiff as importer of said hemp, the amount of duties to be paid on the importation thereof was conclusively fixed by the act of Congress; that the question whether or not the discrimination made by said act of August 30, 1842, between the hemps of India and other unmanufactured hemp, was, in respect to Russian hemp, repugnant to, and an infraction of, the treaty previously made with Russia, was exclusively a question to be discussed and settled by and between the government of Russia and the government of the United States; and that in a private action between the importer and the defendant, it was not competent for the plaintiff to raise, nor the judicial tribunals to decide, any such question."

The court refused this instruction and charged that "the hemps

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of Russia were entitled, by force of the said treaty, to be admitted to entry in the ports of the United States on the payment of duties, at the rate of twenty-five dollars per ton," provided the jury found that the India hemps were known as hemps in commerce. To this refusal to charge as requested, and the charge as given, the defendant excepted. R., p. 15.

The treaty with Russia, so far as this question is concerned, is as follows: (8 U. S. L., 446, 450.)

"Article 6. No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the empire of Russia, of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article, the produce or manufacture of the United States or Russia, to or from the ports of the United States, or to or from the ports of the Russian empire, which shall not equally extend to all other nations."

"Article 11. If either party shall, hereafter, grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional."

The obligation contained in these provisions is this: that the hemp of Russia shall be admitted at as low rates of duty as hemps from any other foreign country. Russia was interested in increasing her exportations, which might be seriously affected by diminishing the duties on the like articles from other countries. Hence the provision in the treaty upon this subject. Hemp being the article now in question, and that of India being, under the tariff of 1842, admissible at fifteen dollars less duty than hemp imported from Russia, the plaintiff is entitled to recover, unless the law annuls the treaty.

By the Constitution, section second, article second, it is provided, that "he (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

Treaties thus made constitute binding obligations between the parties thereto, equally binding upon both parties, and from which neither party can absolve itself while such treaty remains in force. The treaty in question binds both Russia and the United States, both recognising it as in full force and effect. It is equally binding upon our government, its officers and citizens. It is the law under the sixth article of the Constitution, operating upon everybody within the republic. Congress, while the treaty remains in force, cannot change its provisions, because they can only be changed by the action of both parties to it. Until Russia consents to a modification it must remain as that government and ours made it. While we enjoy the advantages which it confers we must yield to Russia all those which it confers upon her. An attempt to establish a contrary rule would be unworthy of our government, and unjust to our unwavering friend. Kent (1 v., 165) says that a treaty, when made by competent authority, is obligatory upon the whole nation. At page 286 he says, "If a treaty be the law of the land, it is as much so upon Congress as upon any other branch of the government, or upon the people at large, so long as it continues in force and unrepealed."

Story, (3 Com. on Con., p. 369,) quoting from the Federalist, speaks of "the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty," clearly implying that treaties, in his judgment, controlled and changed laws, instead of laws controlling and changing treaties.

Where there is a conflict between a treaty and a law, one must give way. It is clear, that a law which violates the faith of a nation should yield to the treaty which pledges it.

The suggestion, that the remedy for a violation of our plighted faith is to be sought by the government of Russia, and that individuals have none which they can assert, is without weight. Why turn an individual who has been wronged, over to that government to prosecute a remedy through the slow and uncertain process of negotiation, when one is open to him affording speedy redress? The chances of redress by diplomatic agency are few and distant, while the courts can promptly correct what has been wrongfully done. Claimants, who have been injured by the execution of an invalid law, are entitled to resort to the most speedy and efficient redress. Why should they be driven to a round-about process of redress, which is seldom efficient in practice, and one which burthens the diplomatic agents of the Government, when there is a simple, certain and appropriate one within their own reach, and which they can properly assert?

The whole commercial world are interested in this question, which involves their rights. Should Russia demand and receive indemnity for these injuries, individual sufferers might often fail to secure their rights, while they would be burthened with expenses and subject to delays which might prove ruinous. The short personal remedy is the true one, and is wholly free from objection. If the collector exacts what is not authorized by an valid and controlling law, he encroaches upon the rights of the importer, and for this encroachment he has a remedy upon the wrong-doer, and the courts are bound to permit him to assert them. They cannot turn him out of court upon the unfounded assumption, that another, less direct and more uncertain one, may afford redress. If two remedies are open to him, he may select the one to which he will resort, but, in the absence of law upon the subject, authorizing it, the courts cannot select for him. In this case the wrong has been committed, and the party has elected and asserted his remedy, and cannot now be deprived of it.

FIFTH. *The question of personal redress is not a political one, requiring legislation, to entitle the party to assert his legal rights.*

This question is applicable to the above case of Taylor vs. Morton. It was not raised by the exceptions in the other case. In Taylor vs. Morton, Judge CURTIS declined to pass upon the questions of fact, or the questions of law above discussed, but dismissed the case upon the ground that the treaty with Russia could not be executed without further legislation by the political branch of the Government. His opinion proceeds upon the ground that the treaty is merely a contract to perform an act, and that legislation is necessary to enable it to be done, and he seeks to sustain his position by referring to *Foster* vs. *Neilson*, (2 Pet., 253, p. 314,) decided under the Florida treaty. This case is an authority against his position. In that case the court said that where the words of the treaty were, that certain grants referred to "shall be ratified and confirmed," legislation was necessary to ratify and confirm them; but had the words used been such as to show an intention to confirm by the treaty, that no legislation would be required. In the present case, the treaty requires no affirmative action by our Government. It agrees that a certain thing shall not be done. It required no law not to do that thing; but if it had previously been done, no law was necessary to undo it, because the treaty itself accomplished that object. The treaty prohibits certain action, instead of contracting to do certain things, as in the Florida treaty. The act complained of was performed in consequence of a law passed ten years subsequent to the treaty. Congress did what the United States had agreed not to do, by an obligation which it could not, in that form, annul.

When a treaty requires, in terms, the enactment of an act of Congress to give effect in form to any of its stipulations, then it addresses itself to the political department, and the courts await the action of Congress.

Wilcox vs. Jackson, Peters' Rep., vol. xiii, p. 498.
Matter of Metzgar, Barbour's Reports, vol. i, p. 248.

But, if complete in itself, it is the uniform law of the land, by the very words of the Constitution, and is to be applied by the courts to all questions, if duly before them for adjudication.

Wilcox vs. Jackson, ubi supra.
United States vs. Arredondo, Peters' Rep., vol. vi, p. 715.
Question of Droit d'Aubaine, Opin. Att'y Gen'l, vol. viii, p. 417.
Maidar vs. Ingersoll, Mich. Rep., vol. vi, p. 373.

A treaty and an act of Congress are both laws, to be administered as such by the courts in all questions of private right. The Peggy, Cranch's Rep., vol. i, p. 109.

But the treaty is the *superior* law. To assert the contrary is to assume that either party may keep or break the treaty at will.

Ware vs. Hylton, Dallas' Rep., vol. i, p. 242.
Gordon vs. Halliday, Washington C. C. R., vol. i, p. 291.
Fisher vs. Harnden, Paine's C. C. R., p. 59.
The Peggy, Cranch's Rep., vol. i, p. 109.
Chirac vs. Chirac, Wheaton's Rep., vol. ii, p. 259.
Hamilton vs. Eaton, North Car. Cases, p. 77.
Little vs. Watson, Maine Rep., vol. xxxii, p. 214.

Upon the faithful observance of treaties depends primarily the peace of the world. Vattel, l. ii, ch. 18.

"Fundamentum justitiæ est fides, id est, dictorum conventorumque constantia et veritas."

To say that the provisions of a treaty between the United States and Russia may be overruled, modified, or abrogated by an act of Congress, is to say that it may be observed or not, according to the sole discretion of the United States, which is contrary to the very essence of international conventions.

The abrogation of a treaty, without the consent of the other party, is a violation of the treaty, and is just cause of war.

The only case in which a treaty has been abrogated, or otherwise *professedly* contradicted by act of Congress, was that of the French treaties, declared of no effect by the act of Congress of July 7, 1798. U. S. Laws, vol. 1, p. 578.

This act of Congress was deemed by both parties a hostile act. British Copyright Convention, Opinions Att'y Gen'l, vol. vi, p. 296.

There is, it is true, question as to the relation between an act of Congress and *a treaty with the Indians*.

Webster vs. Reid, Morris' Rep., vol. i, p. 467.

But these treaties are not treaties between sovereigns, but between the sovereign and his subject. It is a national question, of which the United States judges in its sole discretion as sovereign.

Pre-emptions in Kansas, Op. Att'y Gen., vol. vi, p. 664.
Choctaw and Chickasaw Union, Op. Att'y Gen., vol. vii, p. 142.
Courts of the Choctaw Nation, Op. Att'y Gen., vol. vii, p. 175.

But the repeal of a foreign treaty by Congress, either in whole or in part, is the violation or abrogation of the treaty by the sovereign power, in the same sense as an act of war, and belonging to the same category of international acts.

Hence, if the language of an act of Congress *appear* to be in conflict with any foreign treaty, it is to be construed as inadvertently so, not designedly, and the courts are to give effect to the superior law, as in the case of unintentional conflict of articles of private obligation.

In so far as regards treaties of this class, such has been the constant practice of the Government of the United States.

It has been determined by different branches of the Government that foreign treaties should prevail over statutes, and that it required no action by the political department to confer rights upon claimants where such treaties had been unobserved in legislation and in executive action.

By treaty with Great Britain of the 8th of February, 1853, (10 U. S. L., 988,) a joint commission was provided to pass upon claims of the citizens of the respective governments. That commission had before it cases arising under our treaty with Great Britain of 1815, which is, in its terms and legal effect, the same as ours with Russia. The report of the commission shows (p. 305) that Great Britain was adjudged to have violated the treaty in charging American citizens an export duty on woollens shipped to the United States, which was not charged on those shipped to the East Indies.

The same report shows that, under the same treaty, British subjects were allowed for excess of duty paid to the United States under this same tariff act of 1842. (Report, 301, 311.)

The 25th section of the act is as follows: (p. 566) "That nothing in this act contained shall apply to goods shipped in a vessel bound to any port of the United States actually having left her last port of lading eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the first day of September, 1842, and all legal provisions and regulations existing immediately before the 30th June, 1842, shall be applied to importations which may be made in vessels which have left such last port of lading east of Cape of Good Hope, or beyond Cape Horn, prior to said first day of September, 1842."

The act of 1842 increased the duties on cotton. Godfrey, Pattison & Co. imported cottons from Great Britain between the date of the act and the last importation from beyond the Cape of Good Hope, and having paid duties higher than was charged on the said last-mentioned goods, were held entitled to the excess beyond what was paid on said goods. (Report, 301.)

The report also showed that the duty on cottons under the tariff act of 1824 imposed an increased duty of five cents on the square yard, but that it should not take effect as to goods imported from beyond the Cape of God Hope, or beyond Cape Horn, until six months after it went into operation on goods imported from Europe and other countries. (4 U. S. L., 26.) The commission held that British importers from Europe and other countries were entitled to enter at the rates of the former tariff until the new tariff applied to importations from beyond the Cape of Good Hope or Cape Horn. (Report, 311.)

In each of these cases, the commission necessarily held that the treaties could not be changed by legislation, and no action of the political department of the Government was necessary to create the liability of the parties to such treaties, but that when it had been violated, the liability sprung from the prohibition contained in the treaty. The correctness of these determinations of the commission, it is believed, has never been questioned by either party to said commission, or by any judicial authority. Acquiescence and payment have followed. If it were wrong for the Government to receive and keep these excessive duties, it cannot be questioned that it was wrong for its agents to exact them, for they occupy the same position of wrong as the Government itself; so far as the injured party is concerned they are principals, and liable as such.

Congress, in the tariff act of 1842, (5 U. S. L., 561, § 11,) has recognised the rights of importers under treaties.

This section provides a discrimination of ten per cent. in favor of importations in American vessels, and a further discrimination of ten per centum on importations in foreign vessels from places east of the Cape of Good Hope: "*Provided*, That these additional duties shall not apply to goods, wares or merchandise, which shall be imported after this act goes into operation, in ships or vessels not of the United States, entitled by treaty, or by any act or acts of Congress, to be entered in the ports of the United States, on the payment of the same duties as shall be paid on goods, wares or merchandise imported in ships or vessels of the United States."

Here we have a distinct legislative recognition of the principle contended for by the political department of the Government. Congress makes a sweeping provision, and then limits it so as to conform to the limitations of the various treaty provisions applicable to the subject.

There are other cases, where the Executive Government has admitted, in the most unmistakable manner, that excess of duties demanded and received against the prohibitions of treaties should be refunded.

We have treaties with Prussia and Sardinia containing the same stipulations on this subject as are found in the Russian treaty. Excessive duties were exacted of the subjects of those powers, under this act of 1842, and have been refunded by the Secretary of the Treasury, upon the principles established and acted upon by the joint commission in London.

The legislative branch of the Government has recognised the correctness of these decisions by providing for the payment of the amount found due under them.

No department of the Government has assumed, that the treaty provisions in question were not operative without further legislative provisions. On the contrary, whenever the question arose and was acted upon, the decision or action has been in harmony with the position now assumed. The British government acquiesced in the decision made by the commission, without complaint, as did our own.

The Russian treaty has been in force thirty years without special or general legislation or action by the political department to give it effect. It needed none. If permitted to stand, according to its express provisions, it does justice to both American and foreign claimants by its own vigor, and needs no legislative assistance. Unless a new construction is, at this late day, put upon it, in opposition to all that has passed, the treaty must be held to control by its own strength. It follows that the position assumed by Judge Curtis is wrong and must be revised.

Both cases, on the trial, rest upon the same general principles, to wit, that the treaty must prevail over the act of Congress, and that the word "hemp" in the tariff of 1842 meant the hemp of commerce, instead of "that of botany." If these principles are correct, the collector in each case received fifteen dollars per ton on the hemp more than he was authorized to exact, and this excess should be refunded. The active agent in committing these wrongs is clearly liable to the injured party, whether he is an American citizen or a foreign subject. The treaty is equally the law for both, and each has a legal right to all the advantages which it guarantees. If this is so, then the plaintiffs (below) are entitled to recover back the excess of duties claimed in these suits.

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SUPREME COURT OF THE UNITED STATES.

CHARLES G. TAYLOR ET AL.,
PLAINTIFFS IN ERROR AND BELOW,
vs.
MARCUS MORTON.

Error to the U. S. Circuit Court for the District of Massachusetts.

No. 19.

MARY CURTIS,
ADMINISTRATRIX OF EDWARD CURTIS,
PLAINTIFF IN ERROR,
vs.
ERNEST FIEDLER,
DEFENDANT IN ERROR AND PLAINTIFF BELOW.

Error to the U. S. Circuit Court for the Southern District of New York.

No. 197.

ARGUMENT FOR MARCUS MORTON, DEFENDANT IN ERROR, AND MARY CURTIS, ADMINISTRATRIX OF EDWARD CURTIS, DECEASED, PLAINTIFF IN ERROR.

EDWARD BATES,
Attorney General.

TITIAN J. COFFEY,
Assistant Attorney General.

WASHINGTON:
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SUPREME COURT OF THE UNITED STATES.

FIRST.

These actions of *assumpsit* cannot be maintained, even were it admitted that the moneys sought to be recovered were illegally exacted by the defendants as duties on the hemp in question.

1. When such moneys were received by the defendants, they were bound by the act of 3d March, 1839, to pay them into the treasury, and did so pay them; and if liable to any action for the recovery thereof, they were not liable to an action of assumpsit for that purpose. (5 U. S. Statutes at Large ,348, § 2. Cary vs. Curtis, 3 Howard, 236.)

2. The act of the 26th of February, 1845, (5 U. S. Statutes at Large, 727,) should not be construed to operate, and cannot operate *retroactively*, to subject the defendants in their individual capacity to an action to which they were not before liable.

SECOND.

But if it be conceded that the act of the 26th of February, 1845, (5 Stat., 727,) restores the right of persons who have paid money to collectors for duties under protest, to bring suit against the collectors to test the legality of such payments, which right had been taken away by the act of 3d March, 1839, (5 Stat., 348, sec. 2,) and the ruling of the Supreme Court in Cary vs. Curtis, (3 How. 236,) a fatal objection to these actions still exists. In restoring this right of action, the act of 1845 subjected it to this condition: "Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." It is now said by the defendant in error, in Curtis vs. Fiedler, that this law was not in existence when the duties in that case were paid, and that, therefore, it cannot have a retroactive effect to require the protest to conform to its terms. But the plain and perfect answer to this objection is, that by virtue of the act of 3d March, 1839, the defendant in error had no right of action at all against the collector at the time he paid the duties and made his protest, in September, 1842. The opinion of the court in Cary vs. Curtis established the validity of that act, and showed that it utterly destroyed the right to recover in assumpsit against the collector for duties paid under protest, (the form of remedy adopted in this case.) His right of action was therefore entirely created by the retroactive operation of the act of 26th February, 1845, which declared that nothing nothing in the act of 1839 should be construed to take away or impair the right of any person or persons *who have paid*, or shall hereafter pay money for duties under protest to any collector, &c., to maintain any action at law against such collector, &c. And in the same section is contained the clause above quoted, declaring that *no action* shall be maintained, &c., unless the said protest *was* made in writing. Surely the condition which is thus appended to the right of action is as operative as the clause which confers that right. The right depends on compliance with the condition; and if the protest of the defendant in error did not happen to conform to the requirements of the condition, then no right of action was given to him. If he has any remedy at all, it is that provided by the act of 1845, and that was given him only on condition that his protest was made in accordance with its terms. He cannot invoke the retroactive remedy and discard the retroactive condition on which it is given.

If, therefore, the protest made by the defendant in error, when he paid the duties, was not in substantial accordance with the terms of the act of 1845, the court below erred in overruling the third point (Record 14) of the plaintiff in error, and in allowing the action to be maintained.

The protest is in these words :

"I hereby protest against the payment of the duty charged in this entry, on account that there exists no law authorizing the exaction of said duty.

"Arnel, Sept. 1, 1842. ERNEST FIEDLER."

The custom-house entry of merchandise, on which this protest was written, (Record page 7,) embraces a charge for 1,835 bars of iron, hammered, and for 50 and 15 bundles of hemp, no discrimination being made as to the class of duties protested against.

The ground of objection to the payment of the duties upon which this action is attempted to be sustained, is, that as the treaty with Russia of December, 1818, stipulates that no higher rate of duties shall be imposed on goods imported from Russia than on like articles imported from other places, the duty rate of forty dollars per ton imposed by the tariff act of August 30, 1842, on unmanufactured hemp, should not have been charged on the hemp imported by the plaintiff Fiedler, and described in the entry of the 1st of September, 1842, but the duty rate of twenty-five dollars per ton, imposed by the same tariff act on Manilla, Sunn, and other hemps of India, &c., should have been charged on it, and that the plaintiff has a right to avail himself in this action of that provision of the Russian treaty, to recover the amount of duties thus illegally paid.

It is contended that under the protest filed, it was not competent for the plaintiff below to raise this question, and that the court below erred in overruling the third point of the defendant below, and in entering judgment for the plaintiff.

The requisites of the protest prescribed by the act of 26th February, 1845, as above cited, as a condition of the maintenance of an action against a collector to recover duties paid under such protest, are, that the protest shall be "made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

The object of Congress in requiring not only the objection, but the *grounds* of objection, to be distinctly and specifically set forth, has been fully explained by the courts of the United States ; and the numerous cases in which the sufficiency of protests under this act have been examined by the judges of this court, show beyond question that the protest in this case is fatally defective.

In Mason *vs.* Kane, Maryland circuit court, April term, 1851, (cited 2 Blatch. C. C. R., 390,) Chief Justice Taney said the words of the statute were too emphatic to be overlooked, and the object of the provision is to prevent a party from taking advantage of objections when it is too late to correct them.

In Warren *vs.* Peaslee, (2 Curt. C. C. R., 235,) Justice Curtis, whose frequent and careful examination of the statute entitles his opinion to great weight, said : "I understand that the Act of 26th February, 1855, which requires a protest, had two main objects in view : *one being to apprise the collectors of the objections entertained by the importer*, before it should be too late to remove them, if capable of being removed ; the other, *to hold the importer to those objections which he then contemplated, and on which he really acted*, and prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed by the payment of the money into the treasury."

In Kriesler vs. Morton 1. Curt. C. C. R., 413, Curtis, Justice, says: ' No technical precision should be required, but they must allege distinctly and specifically every substantive objection to the payment, *so that it shall appear that it was in the mind of the party, and was brought to the knowledge of the collector;*" and in this case the protest having stated only that the invoice value was correct, the plaintiff was not allowed to show that the appraisement was not made in conformity to law, the court holding, that inasmuch as it was necessary, under the act, to set forth every ground of objection in the protest, the necessary consequence was that no ground could be taken at the trial which did not appear in the protest.

The doctrine of this case, that no ground of objection can be taken at the trial which is not distinctly and specifically set forth in the protest, has been repeatedly recognised and enforced.

In Norcross vs. Greely, (1 Curt. C. C. R., 114,) where an importer of crockery ware (on which a commission of two and a half per cent had been added under the tariff act of 1842, requiring, "that to the value or price of the article shall be added all costs and charges, &c., including a charge for commission at the usual rates,) had filed a protest, containing only one ground, viz: "that the plaintiffs pay no such commissions as are added;" it was held that this protest was not distinct enough to maintain the objections made on the trial; that commissions were not usually paid in the trade of importing crockery ware from England ; that there was no usual rate of commissions ; and that 2½ per cent was not the usual rate.

In Swanston vs. Morton, (1 Curt. C. C. R., 294,) it was said that a protest under the Act of 26th February, 1845, being a commercial document, need not be drawn with technical accuracy, but it must state distinctly every ground of objection relied on. *It must also show distinctly what is objected to, and what are the grounds on which the objection is rested;* and Judge Curtis adds: "I should not permit any ground, not distinctly and specifically set forth in the protest, to be relied on at the trial."

In Burgess vs. Converse, (2 Curt. C. C. R., 294,) the same learned Judge repeated this doctrine. In this case the protest was, "that the goods were not faithfully or fairly examined by the appraisers;" and the evidence offered under it was, that the appraisers did not examine or see any of the original packages of the merchandise, and only saw samples which had been taken several weeks before, but did not afford a true criterion by which to judge of the importation; and although, when the case reached the Supreme Court of the United States, the protest was held sufficient by a majority of the court, (18 How., 417,) yet Chief Justice Taney and Justices Nelson and Daniel dissented, because "the grounds of objection were not distinctly and specifically set forth in the protest within the meaning of the act, and the protest did not apprise the collector of the particular objection taken at the trial." The rule is however laid down in general terms by Justice Campbell, delivering the opinion in the case, which it is believed is an accurate expression of the law, viz: "It is sufficient if the importer indicates distinctly and definitely *the source of his complaint, and his design to make it the foundation of a claim against the government.*"

The doctrine of the foregoing cases has frequently been declared by the circuit court for the southern district of New York.

In Thompson vs. Maxwell, (2 Blatch. C. C. R., 385,) where the protest was, "we protest against paying additional duty and penalty on (describing the goods,) they being appraised too high; we claim to have (naming the amount,) refunded, being amount paid for additional duty and penalty;" it was held, that under such protest no objection could be raised on the trial to the regularity of the appraisers proceedings; and that under the act of 1845, it is a condition precedent to the right of action, that the claimant shall, in his protest, point out to the collector, by positive and direct notice, *every particular of fact and of law*, which he relies upon as protecting his goods from the duties demanded.

To the same effect are the following cases:

Pierson *vs.* Lawrence, 2 Blatch. C. C. R., 495.
Pierson *vs.* Maxwell, ibid., 507.
Focke *vs.* Lawrence, ibid., 508.
Cornett *vs.* Lawrence, ibid., 512.
Wilson *vs.* Lawrence, ibid., 514.
Tucker *vs.* Maxwell, ibid., 517.

Tested by the rules applied in these cases, the protest filed by Fiedler is insufficient to maintain this action. The only objection set forth is, that "there exists no law authorizing the exaction of said duty."

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It is fatally defective in these particulars:

1st. The entry on which the protest is written contains a charge for duty on hammered bars of iron, and charges on bundles of hemp. The protest fails to state whether the objection to the payment of duties applies to that charged on the iron, or to that charged on the hemp, or to both. It is said in Warren *vs.* Peaslee, (2 Curt. C. C. R., 235,) that "the grounds of the objection to the particular payment sought to be recovered back, must be, not only distinctly, but specifically set forth, and that it must be applied to that particular payment." It is impossible that the collector could learn from this protest what particular payment of the duties charged on the entry was objected to, whether to that charged on all or on a part of the entries enumerated. It is true that the protest is broad enough to cover all, and it is true, as the plaintiff's counsel argue, "that the whole includes a part." But it is precisely that vague generality which the act meant to prohibit. The protest, as is said in Thompson *vs.* Maxwell, must, "by positive and direct notice, point out every particular of fact and law;" and as is said in Swanston *vs.* Morton, "must show distinctly *what* is objected to." If the object of the law be to give notice to the collector of the specific objection, so that, if possible, he may remove its cause, and also to confine the protestant, on the trial, to the ground of objection set forth in his protest, then this protest fails in both particulars, for it does not inform the collector *where* the illegality is, and, of course, is not in such form as to limit the importer, on the trial, to any specific ground, since he may then apply his objection either to the charges on the iron, or to the charges on the hemp, at his pleasure.

2nd. The protest is also defective in this, that it covers the *whole* duty and not the excess on the hemp, of which complaint is now made. The duty charged on the hemp is $40 per ton, and the plaintiff below admits that $25 per ton was legally due, and yet his protest "against the payment of the duty charged in this entry," instead of informing the collector that the objection was to the payment of the duty in excess of $25 per ton, gave him notice in effect that the objection was to the payment of any duty. It should have specified the part of the duty against which he now objects, viz: the difference between $25 per ton and $40 per ton on the hemp. The objection taken in the court below to the payment of this part of the duty is, therefore, in this respect substantially different from that taken in the protest.

3d. The protest is especially defective in this, that it sets forth no *ground* of objection at all. The objection that "no law exists to authorize the exaction of the duty," gives no distinct or specific information, or rather no information whatever of the ground on which the payment of the duties is opposed. It is a form in which any objection to the payment of duties may be clothed, since in every case the ground of recovering duties paid must be, that no law authorized their exaction. It is broad enough to afford a cover for any question that may be raised to the validity of the tariff laws, or the regularity of the proceedings of the custom-house officers; and neither furnishes the collector with knowledge of the alleged wrong, so that, if possible, he may remedy it; nor with the means of restraining the protestant from selecting, on the trial, any particular ground of objection which subsequent information or reflection may suggest. On such a protest the collector is necessarily ignorant of the wrong complained of, and of the issue which he is to meet on the trial.

It is true that this court have said in Greely *vs.* Burgess (18 How., 417) that they will not "exact any nice precision, nor apply any strict rule of construction upon the notices required under this statute." But if the vague, indefinite, and general language of the protest in question be enough to satisfy the terms of the statute, (terms requiring, as this court say in the case referred to, that the importer shall "indicate, distinctly and definitely, *the source* of his complaint, and his design to make it the foundation of a claim against the government,") it is clear that the purpose of the statute has not been effected, and that its carefully selected words are a vain form. To sustain this protest would, it is suggested, be to abrogate the statute and overrule all the cases that have been cited.

It is therefore submitted that, on this ground, the judgment in the case of Fiedler *vs.* Curtis should be reversed.

In the case of Taylor et al. *vs.* Morton, the record does not show that any evidence whatever was given that a protest was made by the plaintiffs, and in the absence of such evidence this court cannot reverse the judgment of the court below. The record professes to furnish all the evidence which was given on the trial, but evidence of the protest cannot be found. The judgment of the court was in favor of the defendant, and the reasons of that judgment do not appear on the record. This court cannot assume that the plaintiff made out a sufficient cause of action, on the trial, unless that cause of action be fully set out on the record. If, therefore, the cause of action as exhibited on the record be defective, this court will not reverse the judgment, even though it should be of opinion that the court below erred in deciding the main question. It follows, that the absence of evidence that any protest was made, (a necessary condition, as we have seen, to the maintenance of the action,) is fatal to the plaintiff's case in this court, no matter what errors may have been committed by the court below on the other points.

THIRD.

But a more serious defect than any other in the record of Taylor *vs.* Morton, is, that it does not show that any bill of exception was taken by the plaintiff to the ruling of the court below.

It is hardly necessary to cite authorities to prove that a bill of exceptions must precede a writ of error from this court. Without it, no question is presented to the court. And the bill of exceptions must be tendered at the trial and signed by the judge, and if, under a rule of court or otherwise, it should not be signed at the trial, it must be signed and filed within a reasonable time afterwards, *nunc pro tunc.* The provisions of the statute of Westminster, and the practice which has grown up under it, are the law of this court.

(Walton *vs.* U. S., 9 Wh., 657; Ex parte Bradstreet, 4 Pet., 106; Sheppard *vs.* Wilson, 6 How., 275.)

The record exhibiting no bill of exceptions, we ask the court to dismiss the writ of error in Taylor *vs.* Morton, without considering the questions which the plaintiff's counsel have attempted to raise therein.

But the same question being properly raised in the case of Curtis *vs.* Fiedler still remains for the decision of this court, unless that case shall be disposed of on the point before suggested.

We have now reached the questions in these cases which go to the original cause of action. They arise on the following facts:

The treaty with Russia of the 6th of December, 1832, (8 Stat. 446,) contains the following provisions:

Art. 6. No higher or other duties shall be imposed on the importation into the United States, of any article the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the empire of Russia, of any article the produce or manufacture of the United States, than are or shall be payable on the like articles, being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article the produce or manufacture of the United States or of Russia, to or from the ports of the United States, or to or from the ports of the Russian empire, which shall not equally extend to all other nations.

Art. 11. If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, where the grant is conditional.

The tariff act of August 30, 1842, (5 Stat., 550,) sec. 3, clause third, imposed the following duties, viz:

"On unmanufactured hemp,* forty dollars per ton; on Manilla, Sunn, and other hemps of India, on jute, Sisal grass, coir, and other vegetable substances, not enumerated, used for cordage, twenty-five dollars per ton."

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* In 5 Stat. at Large, 550, the text of the Act is erroneously printed "On manufactured hemp." In original it is as above.

In September, 1842, Fiedler imported from Russia a quantity of hemp, on which the collector at New York, in accordance with the above provision, charged and received $40 per ton, whereupon Fiedler brought this action of assumpsit against the collector.

In 1846, Charles G. Taylor and Henry A. Taylor imported a quantity of hemp from Russia, on which the collector at Boston charged and received, under the same law, the same rate of duty, whereupon they brought the action of assumpsit in question against him.

The ground of action in both cases is, that under the articles of the Russian treaty above cited, no higher rate of duty should have been charged on Russian hemp than that established by the act of 1842 on "Manilla, Sunn, and other hemps of India," viz: $25 per ton; and that therefore the plaintiffs were respectively entitled to recover in these actions, from the said collectors, the amount of duty paid in excess of that sum.

In addition to the objections already raised to these actions, it is further contended that they cannot be maintained for the following reasons :

FOURTH.

Even if the Russian hemp imported by the plaintiffs was a "like article" with "Manilla, Sunn, and other hemps of India," within the meaning of the Russian treaty, the tariff act of 30th August, 1842, by establishing a rate of duty on Russian hemp in conflict with the provisions of the treaty, must be accepted in the courts of the United as annulling those provisions *pro tanto.*

This proposition assumes:

1st. That as a rule of action imposed on collectors of duties, the provision of the tariff act is in conflict with the provisions of the treaty; and

2d. That Congress has power to annul the provisions of a prior treaty by legislative enactment.

The first assumption cannot well be disputed. Although the clause of the tariff act in question does not refer to the treaty in terms. it impliedly annuls, *pro tanto,* the articles cited, so far at least as they operated as a rule of law in our own courts, by establishing a different one in direct conflict with them. It is impossible that both could be executed; the one must of necessity yield to the other, and this repugnancy is the familiar test by which the repealing effect of a subsequent statute, not referring by name to the prior law, is determined. (Dwarris on Stat. 533, ed. 1848.) And such is especially its effect where the prior law is changed by words in the subsequent statute referring especially to the particular thing on which that law operates. The Russian treaty created a general rule, having no special reference to hemp. The act of 1842, by express words, changes that rule as to a certain article of Russian production, viz: unmanufactured hemp. As to that article, therefore, the act of 1842, by its specific terms, aunuls the provisions of the treaty.

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The effect of the statute, then, being to establish a rule in contravention of the treaty provisions, the remaining question is. Has Congress the power by legislative enactment to modify or annul a treaty regularly made with a foreign power?

The Constitution declares, (Art. 6th, sec. 2d,) that "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

The attribute of supremacy conferred by this clause is common to the three classes named. As was said by Mr. Barbour, in the celebrated debate in the House of Representatives, on the British commercial covention of 1815, (Annals 14th Congress, 1st Session, 1815–'16,) "there is no graduation of superiority between the Constitution, laws, and treaties of the United States as amongst themselves." Supremacy is a term of relation to the States, as is shown by the next paragraph of the clause quoted. The most solemn treaty therefore is not paramount to an act of Congress. It is true, as said by Chancellor Kent, (1 Com. 286,) and cited by the counsel for plaintiffs, that "if a treaty be the law of the land it is as much obligatory upon Congress as upon any other branch of the government;" but this, as he adds, is only "so long as it continues in force and unrepealed." But it is clear from the next sentence that Chancellor Kent was of opinion that Congress had power to annul a treaty. "The House of Representatives," he says, "are not above the law, and have no dispensing power. They have a right to make and repeal laws, provided the President and the Senate concur, *but without such concurrence*, a law in the shape of a treaty is as binding upon them, as if it were in the shape of an act of Congress, or an article of the Constitution." P. 286.

To assume that the legal obligation of a treaty is beyond the reach of congressional annulment or modification, would destroy the balance of the government, and give to the treaty-making power an unwarranted and dangerous preponderance. It is often asserted that the negotiation and ratification of a treaty which requires legislative action to give it effect, imposes on Congress the duty of enacting the necessary laws. But it is certainly true that if the treaty-making branch of the government in the exercise of their wide-reaching power, may bind the government in everything about which they may negotiate, they may withdraw from Congress many powers which the Constitution there reposes. Thus, the power to lay and collect taxes, duties, imposts, and excises may be destroyed, if Congress cannot, as in the cases before us, interfere with treaty stipulations on that subject. And so the power to declare war becomes a vain form, if its exercise does not abrogate, or at least suspend, treaty stipulations. And if, in these and in other cases, the exercise of their constitutional functions by Congress involves necessarily the right to interfere with existing treaties, that right has no limit except the will of Congress, since the Constitution fixes no such limit, and we are not to look for it elsewhere.

Congress has exercised this power of annulling treaties.

By the act of 7th July, 1798. (1 Stat., 578,) Congress declared the United States freed and exonerated from the stipulations of the treaties and of the consular convention theretofore concluded between the United States and France, and that the same should not thenceforth be regarded as legally obligatory on the government or citizens of the United States.

The validity of this act, it is believed, has never been seriously questioned. Chancellor Kent, (1 Com., 176,) refers to it as "a strong instance, in our own history, of the annihilation of treaties by the act of the injured party." But he expresses no doubt of its validity.

Examples may also be cited of acts of Congress which operate so as to modify or amend treaties with Indians. (6 Op. Atty. Gen., 664.) It is true that the learned Attorney General in that case assumes that there is a distinction between a treaty with a foreign power and a treaty with subject Indians; and that distinction is adverted to in the argument of these cases. But it is submitted that it is a distinction for which warrant will be hard to find.

Other writers on constitutional law, of acknowledged authority, have explicitly declared that Congress possesses the power to pass subsequent laws qualifying, altering, or even wholly annulling a treaty, supporting it on the ground that the power so to do is necessarily incident to the exercise of powers granted to Congress, as the power of declaring war, &c. (Rawle on Const., 67, 68; Duer's Const. Jur., 230.)

The counsel for the plaintiffs has claimed the authority of Judge Story for the opinion that treaties controlled and changed laws, instead of laws controlling and changing treaties. The citation only proves that that eminent jurist considered that a treaty, being by the Constitution part of the supreme law of the land, might modify or annul statutes *prior* to it, (which is unquestionably true,) but he nowhere intimates that a statute subsequent to a treaty may not alter or annul it. On the contrary, he expressly denies that treaties can have the controlling force which is now claimed for them. In 2 Com. on Const., § 1508, he says: "But though the power (to make treaties) is thus general and unrestricted, it is not to be construed to destroy the fundamental laws of the State. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope, and no one embraces a right to annihilate another."

The adjudicated cases, cited by the counsel for the plaintiffs, to establish the proposition that a treaty is a law superior to an act of Congress, do not sustain it. The first case cited, the United States *vs.* the Schooner Peggy, (1 Cranch, 109,) contains the true doctrine; that where a treaty is the law of the land, and, as such, affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the courts, *as an act of* Congress. But, whilst of equal force with an act of Congress, it has no more sanctity to protect it from the modifying or annulling effect of subsequent legislation by Congress, than such an act has. The other cases, (Ware *vs.* Hilton, 1 Dall., 242; Gordon *vs.* Holliday, 1 Wash. C. C., 291; Fisher *vs.* Harnden, 1 Paine, C. C., 59; Chirac *vs.* Chirac, 2 Wheat., 259, and Little *vs.* Watson, 32 Maine, 214) merely assert the supremacy of treaties as laws over the laws of the States, and do not touch the present question.

The argument that the modification or abrogation of a treaty by Congress without the consent of the other party to it involves a breach of faith, and affords a just cause of war, however strongly it may appeal to Congress against the exercise of such a power, yet does not strike at the power itself. It may be highly improper or inconvenient that Congress should interfere with treaty stipulations, but these are considerations which cannot affect the validity of their action. The only question here must be whether the power to legislate on the subject exists, and that question is to be determined, not upon general principles of public convenience and policy, but upon the provisions of the Constitution, and the adjudications and practice thereunder. If the other party to the infracted treaty have reason to complain of the action of the legislative department of the government, the proper remedy is found, not by assuming that the infraction is void, but by an application to the executive department for redress. We are thus led to the next objection.

FIFTH.

That a suitor in a court of justice cannot demand the execution of a treaty as a law affecting his private rights, in the face of a subsequent act of Congress establishing a different rule.

This is not the question whether a suitor may in a court of justice avail himself of the provisions of a treaty in full force, executing itself, as the supreme law, and not contravened by any later law of equal authority. In such a case the treaty is as much to be regarded by the court (as is said in United States *vs.* Schooner Peggy) as an act of Congress. But if Congress, by a later law, alter or abolish the treaty provision, it ceases to be the supreme law of the land, which the suitor may assert. The treaty provision is executed by the court as a rule of law in his favor, because the Constitution places it on the same footing as the laws made in pursuance of itself. The treaty is thus executed in the courts as a municipal law. But when it is altered by a subsequent law of equal authority, it ceases to operate as a municipal law, and can no longer be asserted as a ground of private right. The other contracting party to it may have reason to complain of the alteration, and, if he see proper to do so, his complaint must be addressed to the political department of the government, and the question of redress becomes one of public law.

The parties who complain in these cases, of a breach of treaty stipulations, are American importers. The pledge of faith contained in the treaty is made, not to them, but to Russia, who does not complain. The act of Congress which is supposed to infract the treaty was the exercise of a power of legislation expressly conferred on Congress by the Constitution, and it prescribes a clear and specific rule of action for the revenue officers of the government, and operates within our own limits. Will the courts of the United States, because of the conflict between the act and the prior treaty, decide, for the benefit of our own citizens who complain of the act, that it cannot be executed by the revenue officers against the complaining citizens? "If a treaty," says Chancellor Kent, "should in fact be violated by one of the contracting parties, either by proceedings incompatible with the particular nature of the treaty, or by any intentional breach of any of its articles, it rests alone with the injured party to pronounce it broken." (1 Com., 175.) If Russia be injured by the act, her complaints must proceed from the mouth of her emperor, and not from the mouth of our importers, and the redress demanded must be obtained from the political department of the government, whose business it is to redress such grievances upon principles of public law, and not from our courts of justice, whose function it is to adjudicate the rights of suitors upon principles of municipal law.

The reasons which induced Congress to alter the rate of duty on hemp; the extent of injury sustained by the alteration; the kind of reparation, if any, proper to be made, and the parties to whom it may be due, are some of the questions which must embarrass the judicial consideration of the questions presented by these cases. These questions, as is said by Justice Curtis, in Taylor vs. Morton, (2 Curt. C. C. R., 461,) "belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows, that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere in our system of government." And that learned Judge demonstrates that if it be admitted that Congress has these powers, it is immaterial to inquire whether they have, by the act in question, departed from the treaty or not, since, if they have not departed from it, the plaintiff has no case; and if they have, their act is the municipal law of the country, and any complaint, either by the citizen or the foreigner, must be made to those who alone are empowered by the Constitution to judge of its grounds, and act as may be suitable and just.

In accordance with these principles, injuries to private persons by the violation of treaty stipulations, have, it is believed, been invariably redressed, not by actions at law, but by subsequent treaties providing for the payment of indemnities to be ascertained by commissioners. An instance of this method of settling these questions is found in the treaty with Great Britain of 8th February, 1853, and the proceedings of the commissioners thereunder. (See Rep. of Com., 1856.) The cases referred to by the counsel for the plaintiffs in his argument, arising under this treaty, are all illustrations of this method of redress. See also—

Act of 8th May, 1846, (9 Stat., 8.)

Act of 3d August, 1846, (9 Stat., 49 & 50.)

Act of 10th August, 1846, (9 Stat., 92.)

President Polk's special message of 23d March, 1846, (3 States. Man'l, 1475-'7.

SIXTH.

But, conceding that an action for personal redress for the violation of a treaty by the United States will lie in her courts, it can only be when the treaty executes itself as a rule of law ; and, inasmuch as the clauses in question of the treaty with Russia imported only a contract, requiring legislation by Congress to carry them into effect, these actions cannot be sustained.

The principles by which the courts of the United States are guided in giving effect to treaty stipulations as rules of law are stated by Chief Justice Marshall in Foster and Elam *vs.* Neilson (2 Peters, 313–14) as follows : "A treaty is in the nature of a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial ; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. *But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department ; and the legislature must execute the contract* before it can become a rule for the court." (See also U. S. *vs.* Arredondo, 6 Pet., 735.)

It is contended that the stipulations contained in the 6th and 11th articles are simply a contract or engagement which addresses itself to Congress. The stipulation amounts to this : that Congress will so legislate as to admit Russian products on terms equally favorable with like articles from other countries. It is a contract by which the United States bind themselves to restrain within a certain limit the legislation of Congress on a subject, viz : the laying of duties and imposts, specially committed by the Constitution to that body. Does it, *proprio vigore*, operate to restrain that legislation, or does it only pledge the faith of the nation that Congress will, *of its own will*, impose that restraint on its action? If the former, then the treaty assumes to withdraw from Congress the power, explicitly given to it, of regulating duties and imposts ; and this the treaty cannot do, since the treaty making power cannot deprive Congress of its granted powers and usurp them itself. "Where a treaty undertakes to do that which the treaty making power cannot do, the treaty is not the supreme law of the land. To give it effect, the action of Congress is necessary." (Turner *vs.* The Am. Baptist Union, 5 McLean, 345.) In this case, the treaty engaged that certain mission establishments should be appraised and their value paid, and it was held that such a provision was not operative as the supreme law in the sense of the Constitution, as money could not be appropriated by the treaty making power, and that until the power was exercised by Congress, the treaty was not perfect. And, in truth, it is essential to the preservation of the limitations of the government, that the treaty making power should be restrained from exercising the powers delegated to Congress, except where the assent and co-operation of Congress are given by passing a law in conformity with the treaty stipulations. The statute books are full of such laws, by means of which treaties are carried into effect as the supreme law. It is clear, then, that the Russian treaty does not operate, *proprio vigore*, to restrain Congress from legislating on the subject of duties and imposts in contravention of its provisions. It must, therefore, amount only to an engagement that Congress will voluntarily refrain from such legislation, and this necessarily addresses itself to Congress, and is a rule for them and not for the courts. Before the courts can accept it as the supreme law to be administered judicially, it must, by the action of Congress, be changed from a contract into a law.

But even conceding that the treaty itself operates to establish the right of Russian products to admission on the terms stipulated, still, Congress alone can determine what cases are within or without the contract, and what construction shall be given to it; and until Congress by legislation shall authorize the courts to determine these and kindred questions involving matters of fact as well as of law, or, in the words of Chief Justice Marshall, "shall execute the contract," the courts are powerless to adjudicate them. The necessity of this legislative grant of jurisdiction to authorize the courts to entertain questions arising on treaty contracts has often been noticed in this court. "It has been repeatedly held by this court," says Chief Justice Taney, "that under the treaty with France, no inchoate or imperfect title derived from the French or Spanish authorities can be maintained in a court of justice, unless jurisdiction has first been conferred by act of Congress." (Burgess vs. Gray, 16 How., 62. See also Doe vs. Braden, 16 How., 635.) For a further illustration of the refusal of the judiciary to carry into effect an article of a treaty, for want of legislative authority to do so, see President Polk's annual message, (3 States. Man'l, 1458–'9.)

It may be proper to add that the decision of this court in Oldfield vs. Marriott (10 How., 148) does not in any wise conflict with the positions here taken, because the exemption there established was expressly provided for by the legislature in the tariff act itself.

If the views above submitted be correct, it follows that any claim for redress, growing out of the imposition of higher duties on Russian hemp by the tariff of 1842 than was allowed under the treaty with Russia, must be asserted through the government of Russia, not by action in the courts of justice, but by an appeal from that government to the government of the United States, through the appropriate political department, and that, therefore, irrespective of the question of injury, these actions cannot be sustained.

SEVENTH.

Upon the admission of the plaintiffs counsel in Curtis vs. Fiedler, "that all the hemps of India are the products, not of the *cannabis sativa*—the ordinary hemp plant of Russia and the United States, but of other and different plants and trees"—the unmanufactured hemp in question, though the product of Russia, was properly subjected to the duty of $40 per ton. In the state of facts thus admitted, the discrimination in favor of India hemps, made by the act of August 30, 1842, was not an infraction of the treaty with Russia.

1. The reciprocal rights and privileges, guaranteed by the contracting parties to each other in the sixth article of the treaty, are limited to articles *produced* or manufactured by them respectively. The *likeness* therein referred to is a likeness not in the *name* given to the article, or in the *uses* to which it is applied, but in the *article* itself. That this is the true meaning of the provision is shown by the words on the French side, (*les mêmes articles provenant du sol, ou de l'industrie,*) and is apparent from the very nature of the *subject.*

2. The hemps of India, mentioned in the act of August 30, 1842, not being the produce of *cannabis sativa*, the ordinary hemp plant of Russia and the United States, and the only hemp plant grown in either of those countries, but of other and different plants or trees, the same are not, within the true meaning of the treaty, articles *like the hemp of Russia ;* and therefore Congress might lawfully admit them at a lower rate of duty than that imposed on the hemp of Russia, which, being made from the same *plant as the hemp of the United States*, came directly into competition with the *latter.*

3. The fact found by the jury—viz : "that the several hemps of India, specified in the act of Congress and referred to in the testimony, were generally known in trade and commerce at the time of the passrge of said act of Congress as *unmanufactured hemp*"—does not impair or affect the reasoning above suggested. The question in this case depends on the meaning and effect of the treaty, and not on the commercial meaning of the descriptive words in the act of Congress.

4. The tariff act of 1842 takes a distinction between the unmanufactured hemps of India, some of which it specifies, and the unmanufactured hemps of all other countries, and the language employed evidently shows that this distinction must have been founded on some botanical or other fact peculiar to the hemps of India, and whereby they were made to differ from the hemps of other countries. The admission of the plaintiffs counsel brings before the court this difference, which is moreover fully confirmed and illustrated by writers of approved authority.

McCulloch's Dictionary of Commerce. Art. Hemp.
Johnson's Farmer's Encyclopedia. " "
Webster's Dictionary.
Miller's Gardiner's Dictionary. Art. "Cannabis Sativa."
Lindley's Vegetable Kingdom.

As to *Manilla hemp*, the product of the Musa Textilis, see Lindley's Vegetable Kingdom, p. 163.

As to Sunn hemp, the product of the *crotolaria juncea*, see Miller's Gardiner's Dictionary. Art. *Crotolaria juncea.*

Lindley's Vegetable Kingdom, pp. 147, 549.

McCulloch's Dictionary of Commerce. Art. Hemp.

5. Looking to the acknowledged difference between the botanical origin of the hemps of India and the hemps of other countries, the fair and true construction of the tariff act of 1842 is, that all unmanufactured hemps, wheresoever produced, which are the products of the ordinary hemp plant—the *cannabis sativa* of the botanists—are *charged* with a duty of $40 per ton, while the hemps of India, being the products not of that plant, but of other and different plants or trees, are charged with only $25 per ton. This construction gives effect to every word in the clause, and makes it consistent with itself, and with the treaty between Russia and the United States. But however the clause may be construed, the discrimination which it makes in favor of the hemps of India is not inconsistent with the treaty, because these hemps are not "*the like article*" as the hemp of Russia within the words or reason of the treaty.

6. The fact that these products of Russia and of India, thus in origin and in their uses so different, are both known in commerce as *hemp*, by no means proves that they are "like articles" within the meaning of the treaty. The tariff act of 1842 is crowded with instances of articles alike in name and generally adapted to the same uses, but on which different rates of duty are charged. because of the difference in quality. Thus, on Wilton, Saxony, and Ambusson carpets a duty of sixty-five cents per square yard is laid, whilst on Brussels and Turkey carpets the duty is but fifty-five cents, and on Venetian and ingrain carpets but thirty cents. All are carpets, and all have, in general. a like use, but they differ in quality, and therefore are commercially unlike. And yet they are more alike in origin and in use than are the hemps of Russia and of India. Such illustrations might be multiplied indefinitely, but one is enough to demonstrate that it is impossible to infer that two articles are commercially the same, because they have the same name.

EDWARD BATES,
Attorney General.

TITIAN J. COFFEY,
Assistant Attorney General.

Supreme Court of the United States.

MARY CURTIS, Administratrix of
EDWARD CURTIS,
Plaintiff in Error,
vs.
ERNEST FIEDLER,
Defendant in Error,
Plaintiff below.

No. 197.

Argument submitted by WM. ALLEN BUTLER, Associate Counsel for Plaintiff in error.

THE FACTS APPEARING IN THIS CASE ARE BRIEFLY AS FOLLOWS :—

Ernest Fiedler, a merchant of New York, in September, 1842, imported into the port of New York, from St. Petersburgh, Russia, in the ship 'Nicolas Savin,' a quantity of unmanufactured Russian hemp. He also imported at the same time, by the same vessel, a quantity of iron in bars. (*Record*, p. 7, *fol.* 3.)

The tariff act of August 30, 1842, which was in operation at the time of the importation, contained the following provision in respect to the duty to be levied on hemp : " On unmanufactured hemp *forty* dollars per ton ; on Manilla, Sunn, and other hemps of India, on jute, sisal grass, coir, and other vegetable substances, not enumerated, used for cordage, *twenty-five* dollars per ton. *Tariff Act of* 1842, § 3, sub. 3.

The hemp in question not being Manilla, Sunn, or other hemp of India, and being unmanufactured Russian hemp, the then collector, Edward Curtis, (the original defendant in this action), according to the plain and specific directions of the Tariff Act, and in pursuance of instructions from the Treasury Department, charged the duty of $40 per ton, treating it as "*unmanufactured hemp.*" The duties thus charged amounted to the sum of $2,575 38.

He charged upon the iron, duties amounting to the further sum of $848 56. *Record,* p. 9, *fols.* 12, 13.

The importer protested against the payment of the duties thus charged on the entire importation. The protest was in writing upon the margin of the entry, which embraced both the hemp and the iron, and was as follows : "*I hereby protest against the payment of the duty charged in this entry on account that there exists no law authorizing the exaction of said duty. Sept.* 1, 1842.

"E. FIEDLER."

Record, p. 7, *fol.* 3 ; p. 9, *fol.* 14.

No other protest against or objection to the payment of the duties was made by or on behalf of the plaintiff. The duties were paid to the collector September 6, 1842, and by him paid into the Treasury of the United States. *Record,* p. 10, *fol.* 15.

The plaintiff afterwards, in November, 1847, brought this action of assumpsit to recover the difference between the amount of duties charged and paid on the hemp specified in the entry at the rate of $40 per ton and the amount calculated at the rate of $25 per ton, the difference claimed being $965 77. *Narr. Record,* p. 2, *fol.* 15.

The defendant pleaded *non assumpsit. Record,* p. 4.

At the trial, before Mr. Justice Nelson and a Jury, the above facts were proved, and the plaintiff claimed that under Articles Six and Eleven of the Treaty between the United States and Russia, of December 6th and 18th, 1832, the exaction of any duty on the hemp in question beyond $25 per ton was unauthorized and illegal. (*Fol.* 16.)

The Articles of the Treaty thus relied on, are as follows:

"*Article* 6. No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article, the produce or manufacture of the United States or of Russia, to, or from the ports of the United States, or to, or from the ports of the Russian Empire, which shall not equally extend to all other nations."

"*Article* 11. If either party shall, hereafter, grant to any other nation, any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional."

The ground of plaintiff's claim was, that inasmuch as by the same 3d subdivision of the 3d section of the Tariff Act of 1842 there is laid upon "Manilla, Sunn, and other hemps of India" a duty of only twenty-five dollars per ton, no higher rate of duty could legally be imposed on Russian hemp. (*Fol.* 16.)

The plaintiff called witnesses to prove that Russian and Manilla hemps are known in trade and commerce as "hemp," and serve substantially the same purposes, being all used in the manufacture of cordage, &c. *Record, fols.* 18–33.

On the part of defendant it was proved, (by admission of plaintiff's counsel,) that all the hemps of India are the products, not of the *cannabis sativa,* the ordinary hemp plants of Russia and the United States, but of other and different plants and trees.

The Court directed the Jury, that if they found from the evidence that the hemps of India were, at the time of the passage of the Tariff Act of 1842, generally known in trade and commerce as unmanufactured hemps, the plaintiff was entitled to a verdict for the amount claimed by him.

The Jury accordingly found a verdict for the amount claimed by the plaintiff. (*Fols.* 43, 44.)

The defendant's counsel, during the trial, in due time raised the following points ; and excepted to the ruling of the Court in refusing to decide the law of the case and instruct the Jury in conformity therewith. *Record, fols.* 35–40, 45.

First, That the present action of assumpsit cannot be maintained, inasmuch as by the second section of the General Appropriation Act of the 3d of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required to pay, and did pay, such moneys into the Treasury of the United States, and that the Act of Congress of the 26th of February, 1845, cannot operate, nor should it be construed to operate, *retro-actively*, to subject defendant in his individual capacity to such action.

Secondly, That the present action cannot be maintained, inasmuch as defendant acted in precise conformity to the Tariff Act of August 30th, 1842, by which a duty of $40 per ton was laid on all manufactured hemps (except the hemps of India) ; that as between the defendant as collector and plaintiff as importer, the amount of duties to be paid was conclusively fixed by the said Act of Congress. That the question whether or not the discrimination made by the said Act of August 30th, 1842, between the hemps of India and other unmanufactured hemp, was, in respect to Russian hemp, an infraction of the treaty previously made with Russia, was exclusively a question to be discussed and settled by and between the Government of Russia and the Government of the United States, and that in a private action between the importer and the defendant, it was not competent for the plaintiff to raise, nor for the judicial tribunals to decide, any such question.

Thirdly, That the present action could not be maintained, because the protest of the plaintiff, dated September 1st, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question, nor did it discriminate between the duties so charged on such hemp and the duties charged on the iron included in the entry ; but, on the contrary, the said protest referred to all the duties charged in the said entry—those charged on the iron equally with those charged on the hemp, and placed the objection to the payment thereof on the ground that there was no law authorizing their exaction.

Fourthly, That upon the true construction of the Tariff Act of the 30th of August, 1842, all hemps, wherever produced, and even though produced in India, which are the products of the *cannabis sativa*, are charged with a duty of forty dollars per ton, and the lesser duty of twenty-five dollars per ton is limited to hemps not the products of *cannabis sativa*, but of other and different plants or trees ; and that therefore the discrimination made in favor of such hemps of India was not an infraction of the Treaty with Russia. (*Fol.* 35–40.)

The above propositions are now insisted upon by the Plaintiff in Error in this Court.

First. The defendant is not liable in the present action, because, by the 2d section of the Act of March 3, 1839, as judicially expounded by the Supreme Court, in the case of *Cary* v. *Curtis*, 3 Howard, 236, the right of action in assumpsit was taken away.

In the case cited, the duties were paid to the defendant in 1841, under protest, and an action of assumpsit was brought to recover them.

The Court held, on certificate of division, that, inasmuch as the money had been paid by the defendant into the Treasury, under the requirements of the Act of March 3, 1839, (an express law known to plaintiff,) no action could be sustained against defendant to recover it back. (*Opinion of Justice Daniel*, 3 How. 252.)

This Act of 1839, thus judicially construed, was in force in September, 1842, when the plaintiff in this action paid the duties in question, under protest.

The subsequent Act of February 26, 1845, (5 U. S. Stat. at Large, 727,) which gave a legislative construction of the act of 1839, and provided that nothing therein contained should be construed to take away or impair the right of any person paying duties under protest, to maintain an action at law against a collector, to try the validity of the demand of such duties, did not restore the right of action, as against this defendant. It was not in the power of Congress in 1845 to render the defendant, then no longer in office, personally liable to an action for acts done in 1842, which, *when done*, did not subject him to an action.

It is no answer to say, that the Government is the real party in interest. The suit was brought against Edward Curtis, individually, and is continued against his widow and administratrix. The question is to be decided upon the principles applicable to suits between private parties.

This point was raised in the case of *Chester* v. *Curtis*, 1 Blatch, 499, on the motion for new trial, but was overruled by the Court on the sole ground that it was not taken at the trial. Here it was duly taken at the trial.

SECOND. The plaintiff cannot maintain this action, for the reason that the question sought to be tried, viz., whether the Act of Congress is an infraction of a prior treaty stipulation with a foreign power, is solely a political question, which the plaintiff cannot raise, and which the judicial tribunals cannot consider.

The controversy is between the plaintiff, a private citizen, and the defendant, an officer of the United States, executing a law of the United States. The law is plain and unambiguous. It directs the defendant to exact, and the plaintiff to pay, a certain rate of duty on a specified article. The plaintiff objects that the law is void for repugnance to a treaty stipulation between the Government of the United States and the Government of Russia, made ten years prior to the passage of the law. The ground of this objection is, that so soon as the treaty went into operation it became, under the sanction of the Constitution, the supreme law of the land, and so continued up to and at the time of the passage of the Tariff Act of 1842.

The Constitutional provision on which this claim is founded, is as follows : "This Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land ; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (*Const. U. S., Art.* 6, § 1).

By the judicial construction which has been given to this Article, the Constitution is declared to be the paramount rule of legislation, and only such laws as are made in pursuance of the Constitution have the rank of supreme law. But the laws of the United States, not in conflict with the Constitution and the treaties made by the United States, rest on an equal basis of authority. Priority of rank or binding obligation cannot be predicated in respect to either of them. The quality of supremacy is inherent in both, and is identical in degree. The acts of the treaty-making power, the President and the Senate, and the acts of the law-making power, the President, Senate, and House of Representatives, when duly executed, have each the force of supreme law. The Constitution as originally reported in the convention, specified, among the enumerated powers of Congress, the following: "to call forth the aid of the militia in order to execute the laws of the Union, *enforce treaties,*" &c. It was moved to strike out the words "enforce treaties," as superfluous, since "treaties" were to be "laws," which was agreed to *nem con.* (*See Madison Papers*, vol. 2, p. 1233; vol. 3, p. 1409.)

It follows that both treaties and laws are paramount as respects State constitutions or State laws. It follows also that both operate with equal force, and subject to like rules of construction, upon private rights wherever such rights are the direct subject of their provisions. Both are necessarily subject to the same tests in cases of conflict. The later in time furnishes the controlling rule. *Leges posteriores priores contrarias abrogant.* The only ground upon which treaties can be held to annul the provisions of prior laws conflicting with their stipulations, is that the treaty being a law subsequent in time, repeals, *pro tanto*, the prior law. The converse of this proposition is equally true. An act of Congress subsequent to a treaty, and in conflict with its stipulations, repeals or annuls, *pro tanto*, the prior treaty stipulation. The whole current of judicial interpretation and legislative action in reference to treaties, confirms this view. Besides, Congress has exercised its legislative power in reference to treaties. (*See particularly the Act July* 7, 1798; 1 *Stat. at L.* 578, *abrogating Treaty with France, and also the debate on this act in Benton's Abridgment,* vol. 2, pp. 296–316.) This power is essential to the theory and operation of our government, and cannot be disputed.

It is true that this proposition involves the power of Congress to suspend, annul or violate treaty obligations, and to legislate the country into a war. But the question

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is not as to the use of the power, but simply as to the existence of the power. There is no greater force in the argument founded on the consequences of the doctrine now contended for than there is in any other case in which the courts refuse to usurp the functions of the legislature to remedy the effects of bad legislation. And there is in reality no greater ground of apprehension as to the abuse of this power than exists in reference to any other of the powers delegated by the Constitution. Congress may declare war, but the President and Senate, by a treaty duly ratified, may terminate it, and so the President and Senate may, in time of peace, make a treaty which Congress, by subsequent legislation, may suspend or annul. In either case, numberless political considerations environ the action of the respective departments of the Government, and ensure a due regard to the rights of each, and to the public interests of which they are the custodians.

But the question here is not so much as to the relative supremacy of the treaty and the tariff, but as to the right of the plaintiff, in view of the existing facts of this case, to ask the intervention of the Federal Courts to give effect to the one in preference to the other.

This right we wholly deny. The treaty stipulation which the plaintiff invokes is a compact between two contracting powers, and does not create, define, or regulate any private rights or interests, nor can it be applied as the basis of any private claim. It is not a treaty guaranteeing privileges or securing immunities in favor of citizens or subjects of the two countries, in reference to rights which had been acquired or enjoyed so as to be the subjects of direct treaty regulation, or which the treaty created, so as to vest in private persons the privilege of exercising them. The provisions on which plaintiff relies, were designed to secure certain general advantages to the agricultural industry of the Russian empire, and *vice versa* to that of the United States. They pledge the faith of the two Governments respectively to a policy of commercial reciprocity. But they operate upon private rights and interests only as those interests are represented in the entire community as a political whole. Every American citizen and every subject of the Russian emperor, has a political interest in the preservation of good faith between the two governments, but the violation of that faith, real or apparent, cannot be the subject of a private plea any more than it can justify private reprisals or retaliation. It concerns the State and not the private citizen. If the rule were otherwise and actions like the present were entertained, the question whether the public faith had been kept with a friendly power, would be referred to the decision of courts and the verdicts of juries, upon disputed facts, instead of being left to the executive and political departments of the government.

The plaintiff has therefore no standing in court. The treaty under which he claims does not operate upon the right which he asserts, except so far as it engages the public and political faith of the country in which he is domiciled. He is an American importer, not a Russian exporter; the treaty is at the most but a contract between the two powers in reference to duties thereafter to be "*imposed*" by law; the language not being "*collected*" or "*exacted*," which are words denoting executive action, but "imposed," which clearly denotes legislative action.

In all cases in which a treaty purports only to be a contract and not a legislative act, it addresses itself to the political and not to the judicial department, and the Legislature must execute the contract before it can become a rule for the Court. (*Sedgwick on Statutory and Constitutional Law*, p. 450. *Foster* v. *Neilson*, 2 Pet. 314.)

An unbroken chain of adjudications in England and in this country shows conclusively that the Courts never intervene to give effect to treaty stipulations except in cases where the treaty itself gives a rule of law in respect to private rights capable of execution without the aid of further legislation, and operating directly upon the interest which is the subject of the judicial inquiry. In

Elphinstone v. *Bedreechund,* 1 Knapp's Privy C. Rep., 316, (Lord Tenterden delivering the opinion,) the Court held that in a claim to property under articles of capitulation the Municipal Court had no jurisdiction. *Lindo* v. *Rodney,* Doug. 613, *note,* is an authority in favor of jurisdiction in the Courts of Admiralty in matters of prize, in which Lord Mansfield laid special stress upon the fact that the jurisdiction was *recognized* in treaties, and the mode of procedure prescribed by treaty provisions. *Maryatt* v. *Wilson,* 1 Bos. & Pul. 430. In this case, under the treaty between the U. S. and Great Britain, of 1794, a question of the construction of the article permitting reciprocity of trade between the U. S. and the British territories in the East Indies, arose in a suit on a marine policy. It was claimed that the voyage on which the vessel was lost was not permitted by the treaty, and the treaty was construed with reference to the meaning of the permissive provisions directly operating upon commerce and private commercial interests. *Sutton* v. *Sutton,* 1 Russ. & Mylne, 663, under the same treaty, was a question of title to lands, turning upon the construction of the treaty stipulation in reference to continuing rights of natives of the respective countries. It was a question of private right, upon which the treaty operated directly. *Foster* v. *Neilson,* 2 Peters, 253, and *U. S.* v. *Perchaman,* 7 Peters, 51, arose under the treaty with Spain, of 1819, and the precise distinction for which we contend is well exhibited in the conclusions to which the Court came in these cases respectively. The question was whether the treaty, by its terms, operated as a confirmation of certain private rights, or merely stipulated for legislation confirmatory of such rights. In both cases the principle is recognized and asserted that the judiciary cannot give effect to a treaty provision in aid of a private interest, unless such interest is by express terms, and by the force of the instrument itself, made the subject of the treaty. To the same effect is *Ware* v. *Hylton,* 3 Dal., 199. In this act a British creditor, after the treaty of 1783, was held entitled to sue for and recover a debt, although confiscated by the law of Virginia, because the treaty operated directly and with the force of law upon the debt. The same principle is reaffirmed in *Hopkins* v. *Bell,* 3 Cranch 454. See also *The Society for the Propagation of the Gospel* v. *Town of New Haven,* 8 Wheat, 464. *Lessee of Gordon* v. *Kerr,* Wash. C. C. R. 322. *Fisher* v. *Hurnden,* 1 Paine, 59. *Chirac* v. *Chirac,* 2 Wheat, 259. *Blight* v. *Rochester,* 7 Wheat, 535. *Henderson* v. *Poindexter,* 12 Wheat, 530. *Garcia* v. *Lee,* 12 Peters, 511. *Oldfield* v. *Marriott,* 10 How. 148. *Turner* v. *The American Baptist Union,* 5 McLean, 345 ; *Burgess* v. *Gray,* 16 How. 62 ; *Doe* v. *Braden,* 16 How. 635 ; *Taylor* v. *Morton,* 2 Curtis, 454.

But even where a treaty is regarded as executed, its infraction raises only a question between the sovereigns who are the contracting parties, and not a question for judicial investigation or decision. It may well be that the question in controversy here has been already settled as between the two governments so far as to justify congress in the discrimination expressed in the tariff act of 1842. It is a question of fact whether the hemp of Russia is in reality a "*like article*" with that imported from India. It is admitted that it is not produced from the same plant, but from different plants or trees, and the question immediately occurs whether Congress, in prescribing the rate of duty, did not intend to discriminate with reference to the botanical difference between the two several kinds of hemp. This question may have been adjusted between the two countries by diplomatic correspondence ; at all events there is no evidence that Russia has ever complained of any infraction of the treaty, and yet, upon the doctrine of the plaintiff, the question, though decided by the political department of the government, might yet be reviewed in the judicial, upon the testimony of interested importers and on the basis of commercial usage.

It is claimed on the part of the importer that the provisions of the Tariff Act in question must be construed in connection with the treaty so as to impose the duty of $40 per ton exclusively on the unmanufactured hemps of those countries with which no reciprocity engagement exists by treaty, that the law was framed in view of subsisting treaties with foreign nations, and is not to be construed or permitted to operate so as to interfere with such subsisting treaties, and therefore the Russian hemps must be admitted at $25 per ton.

The difficulty in the way of this construction is, that it assumes the whole question, viz., that the Court are to construe the Act in subordination to the treaty. The precise point of inquiry for the Court, if the inquiry be within its jurisdiction, is, whether Congress has or has not, in the exercise of its constitutional prerogative, so legislated as to interfere with the treaty, and whether the treaty itself subsists as a law capable of execution by the aid of the Courts, or only as an executory contract. Subsisting unrepealed treaty provisions which permit or prescribe the exercise of definite commercial rights or duties, stand in the same relation to tariff acts as do other laws which relate to commerce, and all *in pari materia* must be construed so as to give effect, if possible, to each. But the question, which lies back of the rule of construction in this case, is, whether the Court can enter upon the inquiry at all without passing from the sphere of judicial, into the sphere of political, investigation and determination. It is respectfully submitted that no precedent exists for such an exercise of judicial power, and that the evils which would result from it far outweigh the temporary inconvenience to which the importers of hemp will be subjected by being directed to pursue their claims before Congress instead of invoking the aid of the Courts.

Third, The protest is clearly insufficient. It does not "put forth distinctly and especially the *grounds of objec-*

tion." (See the exhaustive and conclusive argument on this point, in reference to the protest in this case submitted by the Attorney-General.)

FOURTH, The hemp in question was properly charged with the duty of $40 per ton; because it was not a *like* article "with the hemps of India," &c., specified in the same section of the Tariff Act.

It is admitted that there is a *botanical* difference; that this difference consists in the fact that the Russian hemp and the American hemp are the products of the same species of plant, while the hemps of India are the products of other and different plants, and it appears that this distinction is recognized and illustrated by the leading writers in the department of science to which this fact belongs. (See points and citations in argument of Attorney-General.)

The question is thus presented whether, in point of fact, the act complained of, if it can be made the subject of such an investigation in the Courts, is amenable to the charge of being an infraction of the treaty with Russia. It is submitted that the ruling of the Court below, that the question turned upon the identity in commercial designation, was erroneous, and that the defendant's exception to this ruling was well taken.

FIFTH. The judgment of the Circuit Court should be reversed, and a *venire de novo* ordered.

WILLIAM ALLEN BUTLER,
Of counsel for plaintiff in error.

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